CONSTITUTIONAL AMENDMENTS RELATING TO ABORTION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S.J. Res. 17, S.J. Res. 18, S.J. Res. 19,
and S.J. Res. 110

BILLS PROPOSING A CONSTITUTIONAL AMENDMENT WITH RESPECT TO ABORTION

OCTOBER 5, 14, 19, NOVEMBER 4, 5, 12, 16, DECEMBER 7, AND 16, 1981

Volume 2—Appendix

Serial No. J-97-62

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
12-577 O WASHINGTON : 1983

S521-27

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PART 1.--ADDITIONAL STATEMENTS

THE WHITE HOUSE
WASHINGTON

April 5, 1982

Dear Orrin:

In recent years, sentiment has increased in the Congress to enact legislation that would restore protection of the law to children before birth. It may be possible for the 97th Congress to take that important step. I write simply to express my own hope that we will not miss this long delayed opportunity.

A few weeks back I said that, "We must, with calmness and resolve, help the vast majority of our fellow Americans understand that the more than one-and-one-half million abortions performed in America in 1980 amount to a great moral evil and assault on the sacredness of life." Whether or not our fellow citizens *will* understand the duty we owe to future citizens depends largely on what action the Congress takes.

I know that on this issue, sad to say, as on many others of great importance, there are sharp differences of opinions as to which action is the best one. Naturally, I hope that these differences will be resolved in favor of the common goal.

But most important, it seems to me, is that the Congress consider one or more of the proposals in the near future. And I want you to know that you have not only my best wishes but also my prayers for success.

Sincerely,

Ronald Reagan

The Honorable Orrin Hatch
United States Senate
Washington, D.C. 20510

TESTIMONY OF SENATOR JAKE GARN
ON PROPOSED HUMAN LIFE AMENDMENT
TO THE CONSTITUTION OF THE UNITED STATES

Mr. Chairman:

I am pleased to have this opportunity to present some thoughts on the Human Life Amendments, one of which I have introduced, now under consideration by this Subcommittee. As you know, ever since I have been in the Senate I have either introduced or co-sponsored such an amendment, and I commend you for your recognition of the urgent need to address this issue directly.

Much has been said already in these and other hearings about the need to reverse the deadly errors the Supreme Court has made in its abortion decisions. I shall not attempt to repeat those arguments here, but rather, to help bring into focus the actual object of this debate.

The fundamental question we must answer is whether or not and to what extent we are going to carry out the basic purpose for which our government was created--the protection of life. As we address that question, we must separate what the Supreme Court says about it from what the facts of the matter are. These facts will remain, regardless of what is said about them. And the facts are that the tiny beings which are removed from their natural environment are human beings, tiny boys and girls, not simply fertilized eggs or "products of conception".

They are human beings because both of their parents are human beings. They can be nothing else. Furthermore, they are alive. Biologists tell us that life does not simply spring up from nowhere, but is passed from organism to organism. These small humans have received life from their parents.

The facts that nearly half of these tiny beings are male, and that all of them are genetically unique, attest to the much-abused fact that they are not simply a part of their mothers' bodies, a kind of tumor or tissue. So also does the existence, at only 4 weeks, of brain, heart, and other organs. Mothers don't have more than one set of these as a rule.

Thus, removal of these children from their mothers' wombs cannot reasonably be described as the protection of "reproductive rights." Obviously, reproduction has already occured by the time such decisions are considered. The only possible right these procedures can represent is a destructive right, the existence of which most humane people would not be willing to recognize.

The extent to which proponents of abortion, and even the Supreme Court, have gone to muddy these facts would be laughable, indeed, if the results weren't so tragic. That they have largely succeeded in deceiving even themselves is illustrated by an event that took place here in Washington on February 15, 1979. On that day a meeting of several pro-abortion groups was held, and some pro-lifers were invited as well. The purpose of the meeting was, ostensibly, to discuss the "reproductive health" programs and to resolve the "polarization and violence" surrounding the abortion issue. However, the issue of abortion was repeatedly ruled out of order. At the end of the meeting, when leaders of the group were making their statements to the press claiming success, three young women stood up. One held a receiving blanket in her arms. Another simply stated that the "polarization and violence" of abortion, which had supposedly initiated the meeting, had never been touched upon, and in fact would not be until those on both sides of the question recognized what was at stake. With that, they opened the blanket to reveal a tiny, perfectly formed, black baby girl, killed by the drug prostaglandin. Needless to say, pandemonium broke out. There were tears, shock and shouting. Many were visibly shaken. According to one prominent physician who was present,

> "The tears in the eyes of some case-hardened reporters were real. They had thought they had known all about abortion, but now they were suddenly facing reality. Abortion was no longer an intellectual or political discussion for this tiny baby girl. Some reporters standing in the room wept openly."

Others were angry, claiming to have been "betrayed", "destroyed", "appalled" by the display. The truth was more than they could handle. They suddenly realized that changing their language had not, and could not, change the facts.

I am impressed when I observe that babies who are no longer than this aborted baby girl are patients in newborn intensive care units all over the country. Some of the most advanced technology available is being used to preserve the lives of babies born more and more prematurely. Here there is ample evidence that they are human and alive, not simply parts of their mothers' bodies. The avoidance and outright denial of these facts represent the kind of intellectual confusion members of the "pro-life movement" are compelled to oppose. We must ask ourselves how a tiny premature infant can be human and alive enough for our most sophisticated medical care, while another infant of the same fetal age can qualify only for abortion.

We all remember the headlines earlier this year about Mike Skinner, who a month before his birth in May, successfully underwent surgery to correct some potentially fatal abnormalities. Surgery on the unborn is so new that it is front page news everywhere. His parents, as well as their doctors and the medical ethics they relied upon, agreed that this unborn person had some rights, including the right to be born alive. Others, like the mother in New England who found she was carrying twins, one with Downs' syndrome, and therefore ordered it to be killed with a needle through its heart, believe that you only have a right to be born if you are healthy or perfect.

Can we honestly say that the difference depends only upon whether or not these children are "wanted" or "convenient"? Can one infant be human and another "sub-human" or "non-human" simply at the stroke of his or her mother's pen as she consents to the destruction of the separate life she carries? I know that these can be difficult, even heart-rending questions, but I must continue to stand for the supremacy of human life itself. Not "meaningful" life, nor "wanted" life, nor "normal" life, nor "convenient" life, but simply life itself, without equivocation.

Advocates of abortion often speak as though they have some kind of corner on rights, justice, equality, and humanitarianism. They are free to believe that, if they wish, but I don't think there can be much justice or humaneness in a philosophy which espouses abortion-on-demand. In the past two decades we have focused increasingly on civil rights, human rights, and discrimination. This emphasis has extended even into our foreign policy. We have bent over backwards to guarantee civil rights, even affirmative action, which sometimes infringes on the rights of others. We have "children's rights" advocates, who choose to ignore the most basic right of the tiniest and most helpless of our children. Many people even advocate "animal rights". How ironic it is, then, that as a nation we continue to blithely deny the rights and very humanity of a whole class of people. After an abortion there can be no "affirmative action" to compensate for past discrimination. Many in the women's movement have even claimed elective abortion as a cornerstone of feminism. Surely the emphasis on expanding a woman's opportunities is at odds with a philosophy that so effectively squelches the opportunity of another. Fortunately, growing numbers of women are coming to this realization, and groups of "feminists for life" are springing up.

Obviously, arguments about the "meaningfulness" of life have value only after the right to life has been recognized. This is not to minimize the size and cost of problems resulting from unwanted pregnancies or potential birth defects. It is unfortunately the case that there are too few families, neighbors, churches and communities that offer meaningful assistance to rape victims, parents of the handicapped, or pregnant teenagers. But this is no justification of the deliberate termination of innocent human life. Dignified and charitable alternatives can and must be expanded at each of these levels. To so willingly abandon the search in favor of such violence demonstrates an appalling lack of imagination and belief in ourselves.

On this particular issue I am compelled to share the concerns expressed by liberal columnist Colman McCarthy, who, in a recent Washington Post column, summarized the matter this way:

> "All that's relevant is the kind of protection that we give to life, from the first stirrings to the final groan. Or to turn it around, is death to be an acceptable solution to social and personal problems that are overbearing?"

I think not.

Mr. Chairman, I urge the Subcommittee's expeditious action to extend maximum protection of the law to the unborn.

Thank you.

PREPARED STATEMENT OF HON. CARDISS COLLINS, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

In 1973, (Roe v. Wade), the U.S. Supreme Court held that the Constitution protects a woman's decision to continue or terminate her pregnancy. The Court's ruling has kindled years of debate amongst pro-life groups, who are opposed to the notion of abortion or abortion on demand. As a result, separate cases have been brought before the Supreme Court with respect to actual funding; it was utlimately ruled that states are not obligated to fund non-therapeutic abortions. The Court also upheld the right of a state participating in a Medicaid program to fund only those medically necessary abortions for which it received federal reimbursement. These moves by the Court have clearly dealt a striking blow to the poor, but the right to choice is still a mainstay of our society.

As an apparent alternative to the thus far unsuccessful efforts to achieve congressional passage of a constitutional amendment to outlaw or limit the practice of abortion, opponents have introduced several bills. They anticipate that this legislation will accomplish the same objective without resorting to the complex process of amending the Constitution. The basic intent is to limit or ban the practice of abortion and prohibit certain types of contraceptives by delegating authority to Congress and the states to make laws with respect to abortion. These Judiciary hearings were borne out of this movement; a movement whic may not even be legal, even the legitimacy of propagating such a bill has been challenged.

This crusdae to restricti a woman's choice emanated from the concerns of a small, but vocal cross-section of Americans. Conversely, polls indicate that at least 77% of all Americans agree that the decision to have an abortion should be left up to the woman and her physician. Studies also reveal that a majority of Americans believe that women who are up to three months pregnant should have the right to decide whether or not to have a child. Authorities contend that unwanted children end up being subject to child abuse, and it is a mistake to force unwanted children to be born.

There are those who, for moral or religious reasons, find abortion morally objectionable. I am cognizant of this view and understand its ecclesiastical basis, but a woman must be given full control of her own body. The imposition of jail sentences upon a female for terminating her pregnancy is absurd. As an ardent supporter of pro-choice, I proudly stand behind the 1973 Roe v. Wade decision of the U.S. Supreme Court and denounce any measures to modify or amend this ruling.

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December 8, 1981

Honorable Orin Hatch
U.S. Senate
Washington D.C. 20510

Dear Senator Hatch:

As a group of psychiatrists, we must express our concern about the Human Life Statute and the Human Life Amendment. Choice is an American right. Abortion should not be a political decision but must continue to be a woman's fundamental right. In addition to making abortion a homicide, the statute and the pill would mean that a woman and her physician could be prosecuted for murder, the IUD and some birth control pills could be illegal, and amniocentesis with its prior genetic counselling would be outlawed.

Any restriction on reproductive freedom or on sex and contraceptive education for teenagers will have a most detrimental effect. Research has established that the incidence of depression in women is far greater after the birth of an unwanted child than after a legal abortion. In addition, the presence of an unwanted child often leads to divorce as well as child abuse and other emotional disorders in children.

As physicians, we know that there is no scientific evidence that can determine when a fetus becomes a person; certainly it is not at the moment of conception.

In addition, we are concerned about the danger to life and to future childbearing if legal abortion is prohibited. The rich have always found ways to have safe abortions so that the risk of illegal abortion will be borne disproportionately by the poor.

Insofar as adolescents are concerned, more and not less sex education is needed in the schools to prevent unwanted pregnancies.

Reproductive freedom and sex education for teenagers are pro-life, pro-family and pro-mental health. We would appreciate your giving serious consideration to our views.

Sincerely yours,

Committee on Women
New York County District Branch
American Psychiatric Association
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December 9, 1981

Senator Orrin Hatch, Chr.
Subcommittee on the Constitution
U.S. Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch,

The Unitarian Universalist Women's Federation is an organization of religious women with members and groups in forty-six states. We wish to inform you of our long standing affirmation of the right to choose the option of a safe, legal abortion.

We oppose the constitutional amendment, S.J. 110, and the "human life bill", S. 1741 to prohibit abortion for all women.

Our opposition to this proposed legislation is based on the following:

1. Enacting a particular definition of fetal personhood into law imposes one particular religious belief which is not held by all religions. We wish to protect the freedom of religion for all faiths.

2. Such legislation would violate a woman's right to privacy whether to carry a pregnancy to term. The woman's rights would be subordinate to a fetus.

3. Such legislation would adversely affect the lives of many women, particularly those who are poor and young. They will be victims of a vicious cycle of poverty, joblessness, and despair. They will be unable to provide adequate food, shelter, and education for the children they bear.

We respect the right of people and religions to differ, but we will not allow an encroachment on our religious freedom.

Sincerely,

Betty Benjamin

Betty Benjamin, UUWF Advocate for
Responsible Abortion Laws

Copy to Religious Coalition for Abortion Rights

Presbyterian Church in the United States

Committee on Women's Concerns

January 4, 1982

The Honorable Orrin Hatch, Chair
Senate Subcommittee on the Constitution
U. S. Senate
Washington DC 20510

Re: Testimony in opposition to constitutional amendment eliminating right of individual choice in abortion.

Dear Senator Hatch

The Committee on Women's Concerns of the Presbyterian Church in the United States opposes any amendment to the Constitution which would eliminate the right of individual choice regarding abortion.

In 1970 the General Assembly of the denomination first stated that abortion should be available to all who desire and qualify for it (1970 Minutes, p. 124.) This principle has been upheld by the General Assembly in each succeeding year.

In 1979 the General Assembly said, "We hold in high respect the value of potential human life; we hold varying viewpoints as to when abortion is morally justified. It is exactly this plurality of beliefs which leads us to the conviction that the decision regarding abortion must remain with the individual, to be made on the basis of conscience and personal religious principles, and free from governmental interference." The Assembly further specifically urged legislators at all levels of government to resist attempts to amend the Consitution for the purpose of eliminating the right of individual choice. (1979 Minutes, pp. 235 - 237)

The 1981 General Assembly, upon recommendation of the Committee on Women's Concerns, reminded the church of its responsibility to be a loving and supportive community and called for gentleness and caring in counseling those involved in the difficult choice of abortion.

The Committee on Women's Concerns, composed of 21 women and men with denominational responsibility for advocating on behalf of women, firmly supports the General Assembly position for the legal right of individual choice in abortion and against any constitutional amendment to eliminate that right.

Sincerely

Cynthia Kirkman

Cynthia Kirkman, Chairperson
Committee on Women's Concerns
/bb

Office of General Assembly / 341 Ponce de Leon Avenue, N. E. / Atlanta, Georgia 30308 / Ph. 404 873 1531

Episcopal Urban Caucus

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February 1, 1982

Senator Orrin Hatch
Chairman
Judiciary Subcommittee on the Constitution
Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

The Episcopal Urban Caucus would like to request that this statement of our position on any constitutional ammendment concerning abortion(including S.J. Res. 110 or any states' rights ammendment)be included in testimony received by your Subcommittee:

"Whereas, the Episcopal Urban Caucus, by opposing the Supreme Court decision restricting Medicaid payments for abortions (at the 1980 Indianapolis Assembly), has affirmed freedom of choice for poor women on an equal basis with their more affluent sisters, and

Whereas, the EUC has joined the Religious Coalition for Abortion Rights(by vote of the Board on February 4), now be it

RESOLVED, That the EUC formally expresses its strong opposition to any law, court decision or constitutional ammendment which deprives any woman of freedom of her choice with regard to abortion."   (1981 National Assembly in Louisville, Kentucky)

We believe strongly that any attempt to legislate or to change the constitution to outlaw abortion is a violation of religious freedom. We support the position of our national Episcopal Church which has stated in two national conventions that any decision about abortion must be made by the woman involved in consultation with her physician and whatever counsel she might seek from her priest in dealing with this complex and sensitive issue. Very religious people can come to very different conclusions on this issue and the state should not seek to interfere by imposing any one set of moral values on those holding differing beliefs.

As a group of Episcopalians concerned about the ministry of the Church in our nation's cities, we are particularly concerned that any attempt to outlaw abortion would be even more unfair to the poor for both medical and legal reasons All women regardless of their economic situation are entitled to religious freedom and the ability to implement their moral choices.

Sincerely yours,

Anne P. Scheibner
Convenor-Economic Justice
Task Group- National EUC Board

KNIGHTS OF COLUMBUS

SUPREME OFFICE • COLUMBUS PLAZA • NEW HAVEN, CONNECTICUT 06507

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October 28, 1981

The Honorable Orrin Hatch
U.S. Senate
Washington, D.C. 20510

Dear Senator Hatch:

Just a short note to thank you for introducing S.J. R.E.S. 110, a New Human Life Amendment.

You maybe sure we shall do everything possible in this area to support your efforts.

Sincerely yours,

Gene F. O'Brien

Gene F. O'Brien
General Agent

GO'B:jak

TESTIMONY PRESENTED BY

HELEN R. PAROLLA
DIRECTOR, PUBLIC POLICY CENTER
NATIONAL BOARD, YWCA OF THE U.S.A.

The National Board of the YWCA of the U.S.A. represents two and one-half million members of local YWCAs in every state of the Union, who are also members of the YWCA of the U.S.A. In every national convention since 1970, the YWCA of the U.S.A., believing that every woman should have the right to choose whether or not to terminate a pregnancy, has put itself on record as in favor of the repeal of all laws restricting or prohibiting abortions when performed by duly licensed physicians, and in 1979 this issue was elevated to the status of one of our five national public policy priorities. The National Board is one of the member organizations of the Religious Coalition for Abortion Rights. We are in a unique position among that and other religious groups in that we are a microcosm of our pluralistic American society. We celebrate that diversity, just as America does, and place a high value on the enrichment that comes from the contributions of women and girls of different races, different backgrounds, different faiths. As such an organization, we are especially sensitive to the welcoming of differences that is essential if we are to be a true fellowship. Just so, we see it as essential to our country that every individual, of whatever faith or of no faith, be valued, appreciated, and given room to grow and be free in our great democracy. America is not a Christian nation, but one whose strength is its welcome and acceptance of people of all religions and racial and ethnic backgrounds.

We support the right of freedom of conscience and belief, within the framework of our Constitution and Bill of Rights. We believe that religious groups have the right and even the duty to bring their ethical insights and perspectives to the continuing debate about just public policies, policies that preserve majority rule while protecting minority rights. When overwhelming public consensus is reached, laws embodying that consensus can be passed in the assurance that they will be obeyed. Constitutional amendments reflecting that consensus can be implemented and respected.

But no such consensus exists in attitudes toward abortion, and no restrictions on this right could achieve such consensus. Every poll continues to show large majorities concurring with the 1973 Supreme Court decision on abortion. Our American Indian members tell us that in their religious traditions, a decision whether to carry a fetus to term has long been considered a private matter. Many of our members who would not seek an abortion for themselves support the right of a woman to make an individual, conscientious decision, involving whatever counselors and advisers she respects. The very existence of our fellow member of the Religious Coalition for Abortion Rights, Catholics for a Free Choice, indicates that fellow Americans who are Catholic are not united in their opposition to the legal option of abortion. We have large numbers of Catholic members who support the right of privacy and conscience of women who may not share their own beliefs. The testimony of the thirty large religious denominations and faith groups who make up the Religious Coalition for Abortion Rights, and whose constituencies have solidly pro-choice positions, is proof that no consensus exists to condemn abortion.

When a law or constitutional amendment is passed without this consensus, it is doomed to failure, as Prohibition was a failure. It cannot be enforced. Rather, illegal activities run rampant, and operating beyond the law, are beyond its constraints and safeguards. Abortion is not a fit issue for legislation or constitutional amendment, anymore than Prohibition was. It should be left to the realm of private decision-making.

Further, any law that would attempt to prevent the Supreme Court from reviewing its constitutionality would seriously abridge the undergirding separation of powers that is fundamental to our Constitution.

While the YWCA does not provide abortion services, many of our member Associations have programs in sexuality education, where the emphasis is upon teaching young women to use their sexuality responsibly and in the light of their own highest values. Abortion is only one of the many options that should be open to women, and the YWCA has since the early 1900s been a pioneer in providing programs which help women understand their sexuality as part of their humanity, integrate their sexual behavior and their values as responsible human beings, and bring to their human relationships respect for themselves and for others.

Our programs in sexuality eduation are often part of a total health program. This approach began in 1906, when the YWCA introduced the concept of positive health. Family relationships, responsible parenthood, family planning, birth control, are stressed. In 1933, the National Board hired a staff member to work exclusively on family relationships. The Board has published booklets on education for marriage, sex education booklets for adolescents, and books on family life. We wrote and widely distributed an NEA and AMA sex education series. We have published guides for teachers of sex education. In 1972, the National Board, in cooperation with the Bank Street College of Education, held workshops with teen women in four cities to learn the top priority needs of young women. Sex education was one of the highest. Thus over the years the YWCA has consistently maintained its support of the legal option of abortion as a right of privacy and conscience for every women within the context of our total programming for the mental, emotional, physical, and ethical well-being of all women and girls.

Helen R. Parolla, Director
Public Policy Center
National Board, YWCA

TESTIMONY
OF
B'NAI B'RITH WOMEN

I AM EDNA WOLF, EXECUTIVE DIRECTOR OF B'NAI B'RITH WOMEN. WE HAVE APPROXIMATELY 900 CHAPTERS IN COMMUNITIES ACROSS THE COUNTRY. OUR MEMBERS RANGE IN AGE FROM YOUNG WOMEN IN THEIR LATE TEENS TO THOSE IN THEIR EIGHTIES, AND I SUPPOSE A FEW IN THEIR NINETIES. THEY PRACTICE JUDIASM IN ALL ITS MODES FROM RECONSTRUCTIONISM TO ORTHODOXY. WHILE WE ARE DIVERSE IN MANY RESPECTS, WE SHARE CERTAIN VALUES THAT ARE INTEGRAL TO OUR RELIGION -- A RESPECT FOR FAMILY, A CONCERN FOR JUSTICE, A PASSION FOR FREEDOM, A REVERENCE FOR LIFE. BECAUSE OF THESE SHARED VALUES WE HAVE NO TROUBLE REACHING CONSENSUS ON THE MATTER OF LEGISLATION TO RESTRICT ABORTION. WE OPPOSE SUCH LEGISLATION IN ANY FORM. WE OPPOSE IT ADAMANTLY AND WE HAVE FOR MANY YEARS. WE SEE SUCH LEGISLATION AS A SERIOUS INCURSION INTO OUR BASIC VALUES.

I HAVE HEARD TESTIMONY BEFORE THIS COMMITTEE IN FAVOR OF LEGISLATION TO RESTRICT ABORTION "IN THE INTERESTS OF FAMILY UNITY." BUT HOW CAN FAMILY UNITY BE SERVED IF A WOMAN"S HEALTH -- PHYSICAL OR EMOTIONAL -- IS JEOPARDIZED BY HAVING TO CARRY TO TERM A CHILD SHE DOES NOT WANT? WE ARE NOT AS MUCH CONCERNED WITH THE FETUS, WHICH JEWISH LAW DOES NOT RECOGNIZE AS A PERSON, AS WITH THE MOTHER AND CHILD AND THE QUALITY OF THEIR LIVES. HOW ARE THEIR INTERESTS SERVED BY LAWS WHICH WOULD RESTRICT ABORTION? AND WHAT OF THE TEENAGER, WHO THROUGH MISGUIDANCE, UNHAPPINESS, OR JUST PLAIN IGNORANCE BECOMES PREGNANT? HOW DOES REQUIRING HER TO CARRY THAT PREGNANCY TO TERM SERVE THE INTERESTS OF FAMILY UNITY, NEVER MIND THE INTERESTS OF THE UNFORTUNATE WOMAN HERSELF? WE, ALONG WITH MANY OTHER GROUPS IN THE COUNTRY DEPLORE SEXUAL PROMISCUITY AMONG TEENAGERS, BUT FORCING THEM TO BEAR CHILDREN THEY DO NOT WANT ILL SERVES THE TEENAGER, HER CHILD, THE TEENAGE FATHER, AND SOCIETY AT LARGE.

WE HAVE NO DOUBT THAT IF LAWS ARE EVENTUALLY ENACTED THAT RESTRICT THE RIGHT TO ABORTION THAT WOMEN WILL FIND WAYS AROUND THOSE RESTRICTIONS. WERE THERE NO ABORTIONS BEFORE ROE V WADE? ALL THAT RESTRICTIVE LEGISLATION WILL DO IS TO MAKE IT LESS SAFE FOR WOMEN, ESPECIALLY POOR WOMEN, TO OBTAIN ABORTIONS. AND THAT, SENATOR, OFFENDS OUR SENSE OF JUSTICE. WHY MAKE POSSIBLE ENACTMENT OF STATE LAWS THAT WILL NOT WIPE OUT ABORTIONS, BUT WILL FORCE WOMEN EITHER TO TRAVEL TO STATES OR OTHER COUNTRIES THAT PERMIT THEM OR FORCE THEM TO RESORT -- ONCE MORE -- TO ILLEGAL, "BACK ALLEY" PROCEDURES? HOW DOES THIS SERVE THE PURPOSES OF A JUST AND GOOD SOCIETY?

OUR MEMBERS VALUE HIGHLY THEIR RELIGIOUS AND PERSONAL FREEDOM AND MUCH OF OUR COMMUNITY WORK IS TO PROTECT THESE CIVIL LIBERTIES. LEGISLATION TO RESTRICT ABORTION WOULD SAVAGE THESE LIBERTIES. LET US SUPPOSE FOR A MINUTE THAT WE WERE TALKING ABOUT LEGISLATION THAT WAS THE OPPOSITE SIDE OF THE COIN: A BILL THAT WOULD ALLOW STATES TO DECIDE WHETHER OR NOT TO FORCE WOMEN TO HAVE ABORTIONS AGAINST THEIR WILL. I THINK WE CAN ALL AGREE THAT WOULD BE AN INTOLERABLE BREACH OF OUR FREEDOM. WHY THEN IS IT ANY LESS OF AN ASSAULT ON OUR PERSONAL AND RELIGIOUS FREEDOM TO SAY WE WILL ACT TO GIVE STATES PERMISSION TO DECIDE WHEN OR IF WOMEN WILL BE ALLOWED ACCESS TO AN ABORTION? S.J. RES. 110 IS CHARACTERIZED BY ITS SUPPORTERS AS THE "DEMOCRATIC WAY" TO DECIDE THE ISSUE. WE THINK NOT. THE DEMOCRATIC WAY TO RESOLVE THE ISSUE IS TO ALLOW ALL RELIGIOUS GROUPS THE FREEDOM TO DEAL WITH ABORTION IN ACCORD WITH THEIR BELIEFS. WE HAVE THAT NOW. WHY SHOULD IT BE CHANGED?

OUR RELIGION TEACHES US TO REVERE LIFE. IT HAS TAUGHT THAT FOR OVER FOUR THOUSAND YEARS. ABORTION IS NOT A MATTER WE TREAT FRIVOLOUSLY. WHETHER OR NOT TO HAVE ONE IS A DECISION THAT HAS TO BE DIFFICULT FOR ANY WOMAN TO MAKE. BUT IT IS A DECISION FOR HER TO MAKE. NOT HER SENATOR.

NOT HER CONGRESSMAN. NOT HER STATE REPRESENTATIVE. BUT THE WOMAN HERSELF. TO DECIDE ACCORDING TO HER CONSCIENCE AND THE VALUES BY WHICH SHE GUIDES HER LIFE.

THAT, SENATOR, IS THE POSITION OF THE TENS OF THOUSANDS OF MEMBERS OF B'NAI B'RITH WOMEN. WE WOULD EXPECT THIS CHAMBER TO WORK TO PRESERVE OUR BASIC FREEDOMS AND HOPE YOU WILL NOT TURN US AWAY BY TELLING US WE MUST SEEK THEM INSTEAD AT EACH OF THE 50 STATE LEGISLATURES.

HERMINE HERTA MEYER
ATTORNEY AT LAW

TELEPHONE
(301) 654-1436

4701 WILLARD AVE
CHEVY CHASE, MD 20815

October 14,1981

The Honorable Orrin G. Hatch, U.S.S.
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

I read your speech with which you introduced S.J.Res.110 "to amend the Constitution to establish legislative authority in Congress and the States with respect to abortion." (127 Cong. Record, daily ed., Sept.21, 1981, S 10194).

Please permit me to make a few remarks. I make them on the assumption that the Constitution of the United States is still in effect.

In that case, the legislative power with respect to abortion is in the States and can legally be taken from them only by a constitutional amendment in accordance with Article V of the Constitution, any pronouncements of the Supreme Court notwithstanding. I am sure, you will admit that the Constitution has not given the Supreme Court the authority to amend it. Congress has now legislative authority with respect to abortion only over the District of Columbia and the federal enclaves. Therefore you would need a constitutional amendment to establish congressional authority to legislate with respect to abortion nationwide. But you would not need a constitutional amendment to counteract a Supreme Court decision.

The Eleventh Amendment was not necessary to overrule a Supreme Court decision, but a constitutional provision. Article III, Sec.2, clause 1 provided originally that the judicial power of the United States should extend "to controversies ... between a State and Citizens of another State ...". Obviously, this could only be changed by a constitutional amendment, which was done by the Eleventh Amendment.

Similarly, the Fourteenth Amendment was not proposed to counteract the Dred Scott decision.

In Dred Scott v. Sanford the Supreme Court said, among many other things, that Negroes descended from African slaves could never become citizens of the United States because they had not be included in the Declaration of Independence nor in the term "citizen" as used in the U.S.Constitution. The 39th Congress obviously did not consider itself bound by this pronouncement, because it provided in the first sentence of the Civil Rights Bill of 1866: "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States." The Civil Rights Bill of1866 was considered to be unconstitutional, not because it conflicted with the Dred Scott decision, but because every subject embraced therein belonged to the powers retained by the States. The Fourteenth Amendment was intended to protect the Civil Rights Bill. The civil rights intended to be protected by the Fourteenth Amendment were those commonly understood to be the privileges and immunities under Article IV, Section 2 and enumerated in the Civil Rights bill of 1866, namely the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, to the full protection of all laws and proceedings for the security of person and property, the right to equal punishment, pains and penalties.

The first version of the Fourteenth Amendment was designed to give Congress power to legislate directly for the States with respect to those civil rights, but it did not pass. The final version did not give Congress new legislative power. It merely prohibited the States from denying certain richts. Consequently, the Supreme Court originally held that the only obligation of the United States is to see that the States do not deny such rights. "The power of the national government is limited to the enforcement of this guaranty." United States v. Cruikshank, 92 U.S.542, 555 (1875). I know, of course, that later the Supreme Court resurrected the first rejected version of the Fourteenth Amendment, but this is not what Congress and the States accepted. Finally, the citizenshipclause of the Fourteenth Amendment took from the States their power to determine who should be a citizen by birth. Before that, only the power of naturalization had been taken from them by the Constitution.

One thing is certain: at the time of the civil war, the constitutional status of a Supreme Court decision was still in effect, namely that it could bind only the parties to a suit as to the object of that suit.

In 1858, it was Stephen A. Douglas who took the position that every pronouncement made by the Supreme Court in the Dred Scott case -- that the Constitution did not permit Negroes to become U.S. citizens nor Congress to outlaw slavery in a territory -- was binding on the entire country for the future because the Supreme Court was the ultimate arbiter of all constitutional questions.

Lincoln called this "an astonisher in legal history;" "a new wonder of the world." He correctly saw that the only decision the Supreme Court had made in the Dred Scott case (as opposed to dicta) was that Scott was still a slave. This, Lincoln was willing to respect, but nothing else the Court had said about the Constitution. Lincoln made the time honored distinction between a court decision and a generally binding law. He considered the matter of such importance that he found it necessary to warn in his First Inaugural Address that if the policy of government is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own rulers.

I described this piece of American history in the Supplement to my testimony of June 22, 1981, before your Subcommittee on the Constitution. I deeply regret that I did not read it, instead of simply submitting it for the record. I tried to show, that to attribute to a Supreme Court decision the character of the supreme law of the land, which can be changed only by the Supreme Court itself or by a constitutional amendment, is absolutely incompatible with the constitutional plan which is based on the principles of sovereignty and self-government of the people.

Some people who belong to groups whom I advise on the Constitution have expressed surprise that you said in your speech:

> "I recognize, however, that under our structure of Government it is the duty of the Court to 'say what the law is', Marbury v. Madison, 1 Cranch 137 (1803). For better or worse, the Court has spoken on the issue of abortion in Roe and Doe; it has articulated a constitutional right to abortion emanating from the Fourteenth Amendment."

This sounds as if you conceded that the Supreme Court has the right to declare what the law is, not just with respect to a legal dispute in an individual case, but with binding effect on the entire Nation and with the effect of changing the Constitution. The Constitution has never given the Supreme Court such power.

However, under that theory, the Supreme Court has treated the Constitution as a cover up to give constitutional respectability to its decisions by which it acted against the Constitution and dictated to the Nation the laws it is permitted to have and the policy it may adopt. No matter how clear a constitutional or statutory provision may have been, the Supreme Court has found some excuse to swipe it aside in order to achieve a desired result.

What do you think, the Supreme Court will do to your proposed abortion amendment? It says clearly enough that "a right to abortion is not secured by this Constitution." But the Supreme Court will have no more qualms to chose between a written Constitution and its own fabricated constitution than it has shown now, because any one who can read English and knows what words mean, must come to the conclusion that there is no right to abortion anywhere in the Constitution. Yet, the Supreme Court insists that there is a constitutional right to abortion in the due process clause of the Fourteenth Amendment.

Perhaps you might have been able to convince your senatorial colleagues of the impossibility of the Supreme Court's abortion holdings with the Constitution by explaining to them the true constitutional meaning of the due process clause, namely that no person may be sentenced to death (deprived of life), to imprisonment (deprived of liberty) or to forfeiture of property (deprived of property) without first having been given access to a proof procedure, today called trial. You could safely have quoted from my book, "The History and Meaning of the Fourteenth Amendment," (pp.125-149), which you have. It is so thoroughly documented that no one can prove it wrong without playing somersault with the English language and with history.

I am convinced that there can be no real reform unless the Congress has the courage to free the Nation from this anti-constitutional, antidemocratic dictatorship of the federal courts. The Constitution has given Congress the power to do that by having given it full power over the entire jurisdiction of the lower federal courts and over the entire appellate jurisdiction of the Supreme Court. Congress could take the first step back to the real Constitution by enacting legislation to prevent the federal courts from taking jurisdiction in cases relating to abortion, busing and school-prayers.

I know that in the hearings before your subcomitee on the Constitution and that of Rep.Kastenmeier in the House several witnesses have taken the rather strange position that it may be unconstitutional for Congress to make use of a power given it by the Constitution. It has, for instance, been argued that the Congress may not so restrict the remedial powers of the Supreme Court as to prevent it from remedying a constitutional violation.

Please let me explain the fallacy of such an argument with respect to court ordered busing for racial reasons. In these cases, federal courts had declared that, their equity powers authorized them to order busing for the purpose of racial desegregation of the schools. In the Supreme Court, the school authorities had argued that the equity powers of the federal courts had been limited by Title IV of the Civil Rights Act of 1964 where Congress had clearly prohibited the use of busing for the purpose of achieving racial balance. The Supreme Court brushed this aside by declaring, "there is nothing in the Act that provides us material assistance in answering the question of remedy for state imposed violation of Brown I." But as if to justify the Court's unprecedented interference with the schools, the Supreme Court found it necessary to explain that this remedial power "may be exercised only on the basis of a constitutional violation." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S.1, 16, 18 (1971).

However, the constitutional violation was committed, not by the school authorities, but by the U.S.Supreme Court by illegally extending federal jurisdiction over the schools of the States over which the Constitution had granted no federal judicial power.

But let us assume for the sake of argument that there was a violation of the Fourteenth Amendment, as the Supreme Court said. Then Section 5 of the Fourteenth Amendment empowered the Congress, not the Supreme Court, "to enforce, by appropriate legislation, the provisions of this article," meaning of the Fourteenth Amendment. Congress had gone along with the Supreme Court's Brown decision and, in the Civil Rights Act of 1964, had provided grants for assistance in dealing with problems incident to desegregation, but it clearly prohibited busing in order to achieve racial balance. The Supreme Court simply disregarded the Constitution as well as clear congressional legislation.

I must apologize for the length of this letter, because I know that you are very busy. However, you know that these are matters which are important to a majority of the American people, and therefore you will understand why I wrote it. I wish I had an opportunity to talk with you from time to time.

Yours very sincerely,

Hermine Herta Meyer

Hermine Herta Meyer

PREPARED STATEMENT BY CONSTANCE STREET, UNITED CHURCH OF CHRIST OFFICE FOR CHURCH IN SOCIETY

The Office for Church in Society, an instrumentality of the United Church of Christ in its capacity to identify, analyze and respond to emerging social issues of special importance to the denomination, is submitting the following statement in opposition to any constitutional amendment on abortion that would overturn the 1973 Supreme Court decision of Roe v. Wade.

The several parts of the statement include a description of how the United Church of Christ establishes its social policy; various policy statements on freedom of choice in abortion adopted by General Synods of the United Church of Christ over the years; examples of activities of various other instrumentalities, agencies, and conferences of the UCC that confirm the commitment of the church to maintain a national policy of freedom of choice position on abortion; and finally, an exploration of other aspects of this denomination's social ministry and the implications of such concerns for the current debate on abortion.

I. SOCIAL POLICY-MAKING IN THE UNITED CHURCH OF CHRIST

Since coming into being as a denomination in 1957, the United Church of Christ has developed a program and policy on a wide variety of concerns. The United Church of Christ is a covenant church, each body within the church speaks only for itself. There are nearly 6,400 local churches in the denomination with approximately 1.7 million members.

Local churches of the United Church of Christ are organized into regional bodies known as conferences. Each conference selects from its local church membership persons to attend the General Synod which is the representative and deliberative body of the United Church of Christ.

Composed of between 675 to 725 church members elected by their conferences, General Synod is the widest representative body within the UCC. More than any other body it represents the whole church, and when it speaks, it represents the best vehicle we have as a denomination for speaking with one voice.

The social policy statements do not represent the views of all UCC members, nor do they bind all UCC members. But as members of a covenant church, all UCC members are expected to take these statements seriously and to consider if God is speaking to them through the statements of these various bodies.

The policy which is adopted, whether by the General Synod or other bodies of the United Church of Christ, reflects the view of that body at that time. Because social conditions change, social policy naturally evolves over time. In a legalistic sense, the policy of one General Synod does not bind the actions of a later Synod. Each Synod speaks for itself in making public statements. Because of this, the same pro-choice position has been reaffirmed by one Synod after another.

II. POLICY STATEMENTS ON ABORTION

A. The Eighth General Synod

The 8th General Synod meeting in 1971 adopted a proposal for action called "Freedom of Choice Concerning Abortion." The following excerpt was taken from the section on theological and ethical factors.

> "Standing in the Hebrew-Christian tradition, we affirm God as the Source of life--our life, all life, life to the full. He has called us to share the work of creation with him, giving us the privileges and responsibilities of fellowship in the family and in the wider unities of society. Thus we affirm the freedom with which God endowed men and women, but we affirm and receive this as freedom bound to responsibility. At its best our Western legal tradition, too, has served the dual prupose of protecting human freedom and helping human beings to discharge their responsibilities to one another.
>
> "Our religious heritage has also stressed reverence for human life. Accordingly, the enhancement of human life and the protection of the rights of persons, particularly the weak and defenseless, has become an important element in our legal system. It has found expression in laws intended to protect those who cannot protect themselves, such as children, including the unborn. It is neither likely nor desirable that organized society would disavow its responsibility in this regard.
>
> "Inevitable, therefore, a judgment will be made or assumed as to when personal human life begins and at what point society has an interest in it and affirms an obligation toward it. Although a form of life exists in the sperm and the unfertilized ovum, a new kind of life emerges at the moment of their union. Many regard conception (up to 72 hours after coitus), others implantation (7 days), as the beginning of an invioable life. But while such life is human in origin and potentially human in character, the

integration of bodily functions and the possibility of social interaction do not appear until later. Alternative candidates for the beginning of significantly human life are the final fixing of the genetic code (3 weeks), the first central nervous system activity (8 weeks), brain development and cardiac activity (12 weeks). Some time after the twelfth week 'quickening' occurs; that is, the mother can feel the arm and leg movements of the fetus. 'Viability' in the present stage of technology begins between the 20th and 28th week, and the fetus has a chance for survival outside the womb. At some point in the process from conception to birth there comes a period when a life contains that which ~~is~~ is essentially valued as significantly human and should be vested with a sancity uncompromisable to the interest of lesser claims.

"An ethical view does not require an *undifferentiated* concern for life. It places peculiar value upon *personal* life and upon the *quality* of life, both actual and potential. In that light it is understandable that today an increasing number of persons find it difficult, if not impossible, to attribute anything more than the *potentiality* of human personhood to the embryo in its *early* stages. The implication is that factors other than its existence may appropriately be given equal or greater weight at this time--the welfare of the whole family, its economic condition, the age of the parents, their view of the optimum number of children consonant with their resources and the pressures of population, their vocational and social objectives, for example.'

"On the other hand, many would agree that during the later months of a normal pregnancy life should not be interrupted except for the most serious reasons (such as the physical or mental health of the mother, abnormality or disease of the fetus, incest, or rape).

"This distinction is of the greatest importance. Individuals contemplating an abortion should make a responsible decision early, certainly within the first two or three months.

B. The Ninith General Synod

Continued support for a pro-choice position on abortion was affirmed during the Ninth General Synod which also adopted a proposal of action on "Freedom of Choice". In its entirety, the statement reads as follows:

"The Ninth General Synod affirms the Supreme Court decision of January 22, 1973, removing the legal restrictions on medical termination of pregnancy through the second trimester. We further commend the Instrumentalities of the General Synod that have influenced abortion reform.

"While respecting the rights of individuals of various convictions on medical termination of pregnancy and family planning we reaffirm the Eighth General Synod call to action for freedom of choice with responsibility in the area of abortion.

"We direct the Executive Council to implement the following actions (through appropriate Instrumentalities' cooperation):

1. To urge pastors, members, local churches, Conferences and Instrumentalities to resist attempts to erode or negate the recent Supreme Court decision as well as to strengthen state and local efforts in this regard.

2. To urge pastors, members, local churches, Conferences and Instrumentalities to provide new and better counseling services to all persons who have problems related to unwanted pregnancies. Training and facilities for these services must be expanded.

3. To urge pastors, members, local churches, Conferences and Instrumentalities to support and expand programs in the understanding and responsibility for human sexuality in the schools, agencies for adult education, communications media, and other public institutions; and to encourage the extension of information and services related to contraception as instrumental to the prevention of undesirable pregnancies and the achievement of wholesome family life.

4. To provide educational resources, consultative services, and training for conferences, associations and local churches who wish to sponsor programs concerned with human sexuality and family planning.

5. To urge the Division of Health and Welfare to work for the expansion of family planning services in the communities they serve and to help to initiate new programs.

6. To develop ministries on behalf of disadvantaged and minority groups, of the young and the poor, which would give them choice in the area of family planning and in the termination of unwanted pregnancies."

C. The Thirteenth General Synod

The following statement on "Freedom of Choice" was adopted at the most recent Synod held in June, 1981 by overwhelming majority of the 705 delegates in attendance.

"We, the delegates of the 13th General Synod, reaffirm the theological statements of the 8th, 9th, 11th and 12th General Synods on the matter of freedom of choice on abortion, and support the following statements:

1. The question of when life (personhood) begins is basic to the abortion debate. It is primarily a theological question, on which denominations or religious groups must be permitted to establish and follow their own teachings;

2. Every woman must have the freedom of choice to follow her personal religious and moral convictions concerning the completion or termination of her pregnancy. The church as a caring communtiy should provide counseling services and support for those women with both wanted and unwanted pregnancies to assist them in exploring all alternatives;

3. Abortion should not be considered a primary method of birth control. To reduce the need for abortion, the church is concerned that counseling, family planning information, and assistance be made available to all;

4. Freedom of Choice legislation must be passed at both the federal and state levels to provide the funds necessary to insure that all women, including the poor, have access to family planning assistance and safe, legal abortions performed by licensed physicians;

THEREFORE, BE IT RESOLVED that the Thirteenth General Synod of the United Church of Christ urges individual members of the local churches and the appropriate Instrumentalities of the United Church of Christ to continue efforts to guarantee a woman's freedom of choice as outlined above;

BE IT FURTHER RESOLVED, that the Thirteenth General Synod of the United Church of Christ urges individual members of the local churches, associations, conferences, and the appropriate instrumentalities and agencies of the United Church of Christ to oppose actively the passage of constitutional amendments or legislation revoking this freedom of choice.

III. STATEMENT OF ACTIVITIES

Some of the various General Synod pronouncements or proposals for action have been cited that affirm freedom of choice for those who must make a decision regarding completion or termination of a pregnancy. But as was stated initially, General

Synod is only a deliberative body. It has been the various national instrumentalities, the regional bodies of conferences, and individual UCC clergy and laity that have translated General Synod statements into action by engaging in various activities that support these statements on freedom of choice.

The range of support and activity within the UCC on the continuation of the pro-choice position in public policy has come from the Office of the President, the Board for Homeland Ministries (BHM), and the Coordinating Center for Women (CCW). Particularly, the latter two groups have worked widely within the UCC structure in educational campaigns to disseminate materials on the pro-choice position to such forums as the General Synod. CCW and BHM have jointly prepared issue papers and educational materials which have been used extensively at the conference level in the process of selecting and preparing delegates to General Synod.

Another UCC instrumentality that actively supports the freedom of choice position on abortion is the Office for Church in Society (OCIS, established by the 10th General Synod with a mandate to study the Gospel in its bearing on people in society; provide and publish information on social issues, and cooperate with agencies of the UCC and with other appropriate bodies in making the implications of the Gospel effective in society.

OCIS and BHM helped to establish the Religious Coalition for Abortion Rights (RCAR). RCAR, a coalition which presently has over thirty Protestant, Jewish and Catholic groups was established to educate the religious community and the general public on the need to maintain the right to choose abortion. RCAR emphasizes that the right to choose is an important part of the religious freedom heritage of this country and such choice should be based on individaul moral decision-making. The presence of RCAR in Washington, DC is to make Congress aware of its corporate responsibility to the option of abortion as a principle tenet of religious freedom.

Many United Church of Christ leaders have been among the signatories of "A Religious Statement on Abortion: A Call to Community", signing this document annually each time of its issuance on the anniversary of the 1973 Roe v. Wade Supreme Court Decision. The UCC signatories have included a number of conference heads and other UCC clergy, representing a range of constituencies within our denomination.

In addition to the instrumentalities of the United Church of Christ, many of our conferences have passed very strong pro-choice resolutions. In particular, the Conferences of Iowa, Rocky Mountain and Nebraska have passed strong pro-choice resolutions and have affiliated with and been active in the state RCAR's of their respective areas.

Various conferences have also been active at the state level in campaigns as legislatures have had to grapple with the issue of freedom of choice and to permit that freedom to continue irrespective of the economic circumstance of the woman involved.

IV. SOCIAL IMPLICATIONS OF MORAL AND RELIGIOUS FAITH

The emphasis within the UCC denomination on a freedom of choice position on abortion is based on a concern for the condition and rights of women, the injustices suffered by women historically, and injustices still present in this civil order. An affirmation of the rights of women has been expressed in support of equal rights as well as abortion rights.

The affirmation of abortion rights is only a part of a broader concern in the life of the church for the protection of the rights of racial, language, and ethnic minorities, and of human rights abroad. The United Church of Christ through its various bodies and instrumentalities has given wide support to a variety of programs that support the struggle of peoples that would erase social inequities and overcome the injustices in modern life.

There is, in the many social policy statements and social ministries of the church, a passionate concern about justice issues. Such a social policy is concerned with the struggle of human rights, the right of every person for an opportunity to earn a living, and the correction of those conditions which prevent full equality of opportunity or deny the reality of equal treatment before the law.

Those who oppose the right of a woman to choose whether she wants an abortion often point to concern for the family and the society as a whole. There is an attempt to deny these same considerations are made by those who favor continuation of the present national policy. The many churches, conferences, national instrumentalities and bodies in the UCC have a balance of consideration for the needs of the family as well as the needs and interests of society. There is recognition of the many familial and societal problems but it is a simplistic allegation that would blame the increase of divorce, problems with children, child neglect and spousal abuse with freedom to choose an abortion. There is not any conclusive evidence to substantiate any of these claims, or that the freedom to choose an abortion has contributed in any way to the disruption of family unity.

Certainly, in the life of churches in this denomination there is much concern about family life. Recent activities have acknowledged the problems facing the traditional family; that the family in today's society is changing and therefore must be supported and served by the church creatively. There is concern for the stress in the family arising from economic pressures, changing roles and values, as well as the impact of the mass media and mobility.

Recognizing the continuing controversy among members of the whole Christian family over such issues as birth control, divorce and permissible family forms, our position is, "Until Christ's followers attain that perfection of knowledge which can only come when the new age is fully manifested, there will continue to be such difficulties with interpreting the traditions. The United Church of Christ, precisely because of its theological diversity, has an unique opportunity to demonstrate the fruitful power of diverse traditions brought to bear upon a pressing contemporary issue like family life." This statement was expressed in materials prepared by the Executive Council as a part of study aids to explore the biblical and theological implications in anticipation of proposing family life as a priority in the life of the church.

We are committed to an understanding of and a responsibility for human sexuality and family planning. The church has engaged in a major effort with a preliminary study of human sexuality which has been termed "a landmark in the church's efforts to deal responsibly with changing sexuality, morality and ethics in American society." (United Church of Christ, Human Sexuality: A Preliminary Study, New York: United Church Press, 1977). The study was designed to open debate on an issue that is important to the life of the church. As with any controversial issue within the church, the study was designed to explore the issue through various viewpoints, and to explain changes in society in terms of theological considerations. Such studies of issues are a reconciliation of theological, ethical and practical considerations which guide a personal choice.

We recognize that the freedom of choice position on abortion is highly controversial and explosive. Because of this controversy, we affirm the 1973 Supreme Court decision of Roe v. Wade as the best for this nation. We believe that a decision to choose an abortion should be made by a woman, a decision affirmed as a constitutional right to choose without coercive interference by the government. In freedom of choice, a woman must follow her personal religious and moral convictions concerning the completion or early termination of her pregnancy. We support freedom of choice with no governmental interference, either state or federal.

Whether abortion is a religious issue still continues to be a controversial aspect of the abortion debate. Denying the right of choice in abortion based on religious and moral principles overlooks one fundamental problem that is not overcome by a legislative measure that states that human life begins at conception. For, as the 8th General Synod states, "But while such life is human in origin and potentially human in character, the integration of bodily functions and the possibility of social interaction do not appear until later."

Because we believe fundamentally that a particular stance on abortion is taken because of one's religious views, and recognizing the diversity of religious opinio on the issue, we do not want to impose our religious beliefs on others. One particular statement of the 13th General Synod needs repeating, "...that when life (personhood) begins is basic to the abortion debate. It is primarily a theological question on which denominations or religious groups must be permitted to establish and follow their own teachings."

As was stated by the Eighth General Synod in reference to the restrictive legislative policy on abortion then in force, "The theological and scientific view on when human life begins are so numerous and varied that one particular view shou not be forced on society through its legal system." We believe that this should guide the legislative policy on abortion.

We believe that the decisions to choose or not to choose to abort a pregnancy is a stressful situation. But who has the right to judge that this termination of a pregnancy is wrong, that human life, even the potential of human life must be preserved at all cost? In considering whether to terminate the pregnancy, very many factors come into play such as whether the family can meet the emotional and financial demands of a child. And, in the case of a child that is deformed or conceived because of rape or incest, the emotional conflicts and suffering are an even greater burden to the woman and her family.

Many decisions in the family have to resolve some emotional conflict. Certainly the decision or lack of a firm decision and commitment to have a child can be a very stressful situation. Decisions are often made that have to balance conflicting demands of one member of the family over the competing demands of another member of the family. But the strength of the modern family is that it can meet competing needs of the family because of economic and legal alternatives in this civil order.

It is because the decision to choose an abortion is so difficult that it must continue to be made by the woman that it should be a joint decision where possible with her husband, in consideration of the needs of the whole family. This is a decision that cannot be made by the society with such vast implications for a family unit.

Familial dysfunctions, such as child abuse, deliquency and emotional problems, are manifested more immediately and directly to members of the family, long before they are exhibited to society. As well, the joy of human life is more celebrated in the family before it touches society at large. An example is the favored child who is guided and notured in the home environment, in the educational process, who grows up to become a productive worker and citizen and member of the community. Consideration for the welfare of the whole family should be preserved which a freedom of choice position will do. And freedom of choice should be exercised responsibly.

There are value judgments that are made in life; that societies place a higher value on some lives than it does on others; that more productive resources and opportunities are placed at the disposal of inhabitants of the developed world than the underdeveloped world; that there is suffering in life, much of it caused by racial and economic inequities; that animosity exists between communities as well as nation states, and there is much needless human misery in the world that can be readily eradicated if we would but commit the resources.

Finally, we live in a less than perfect world because of the civil and economic orders we have created, and because of this we are less than perfect human beings.

Given all the diverse factors in human existance, how can it be determined that there is only one right decision, that the decision must be made by society, by its civil order with no freedom of choice for the woman involved. The state cannot see all the factors impinging on a woman who must make such a decision.

We believe that our activities preserve our constitutional process. We oppose any constitutional amendment that would overturn Roe v. Wade, and we are committed to preserving freedom of choice for all women.

The Southern Baptist Theological Seminary
2825 LEXINGTON ROAD • LOUISVILLE, KENTUCKY 40280

December 9, 1981

Senator Orrin Hatch
Senate Office Building
Washington, D. C. 20015

Dear Senator Hatch:

I am very much concerned about several bills which are currently being considered by your committee. Particularly, I am concerned about S. J. Res 110, S. J. Res. 17, and S. 583.

Let me begin by commenting upon S. 583. An effort "to limit the jurisdiction of the courts of the United States in matters relating to abortion," seems to me to raise several substantive problems. In a government which is comprised of three branches which are designed to serve as checks and balances each for the other, it seems to me to be terribly dangerous to have one branch to attempt to limit the jurisdiction of the other. The danger of this is focused precisely in the fact that the courts have served as the only recourse for persons seeking redress of grievance from the injustices perpetuated by and at law. While the legislative branches of the federal government and the state legislatures are required to pass laws which are consistent with their understanding both of the constitution of the United States and of the will of the people in their various jurisdictions, it is the responsibility of the courts of our land to serve to interpret whether or not those laws in fact are consistent with the ideals of our corporate justice and with the specific requirements of the constitution of the United States. I think, for instance, of our country's recent struggle to come to terms with the relationship between civil law and racial justice. Had it not been for the Federal court system, Blacks in America still would be in a situation of being segregated from many public facilities and the public school system by law.

Furthermore, they would be excluded from access to voting privileges which are guaranteed to every American under the constitution. In my own state of Kentucky, for instance, until 1954, the Day law prohibited whites and blacks even mixing together in public school facilities. Had it not been for the courts of our land, the conscience and ideals of justice of our nation would not have been tapped in order to correct an injustice to vast numbers of our peoples. Are we now to attempt to limit the ability of the courts to decide whether or not particular laws within a given state may or may not square with the Constitution of the United States concerning abortion? This, it seems to me, is a dangerous trend. Under the guise of states' rights, the effort is being made to short-circuit the system of justice which has been installed wisely by our founding fathers. The Constitution wisely grants access for review to the particular laws of this country and their various states by the appeal to the interpretive branch of our government, namely, the courts. This same mentality could be used to limit the jurisdiction of the courts regarding a particular state's law that may permit anything from racial segregation to varieties of police action that would defy the guarantees built into our Bill of Rights.

The American citizenry has only one constitution, and we are, as our Pledge of Allegiance indicates, "one nation, under God, with liberty and justice for all." If we have one Constitution, and we are in fact one nation, we cannot now decide that the Federal courts cannot look into the justice or constitutionality of an issue that is as important to all of us as is abortion.

In this matter, I am as much concerned about the process that we go about dealing with a perceived problem, as we are about the problem itself. I can agree with you and other senators who are supporting your efforts to limit access to abortion, that abortion poses a major moral issue in the United States. The manner in which we go about trying to correct that problem, however, must be acceptable on constitutional grounds and on the basis of our concern for equal justice for all. While we may not agree with certain decisions regarding pregancy termination, we ought not subvert the constitution of the United States in order to rectify the problem by laws over which the central agency given the responsibility for monitoring and interpreting the justice of law as law has no review. This effort, it seems to me, is like burning barns to get rid of rats.

What is more acceptable is to pass a law, either at the Federal or within the state legislatures, that is itself constitutional and representative of the consensus within the American public regarding the morality and legality of access to abortion. I would think that congressional energies would be much more wisely spent pursuing a law based upon justice and equity rather than trying to circumscribe the powers of the courts.

This brings me also to consideration of the other bills. I am convinced that one of the issues that is involved in the public debate regarding policy pertaining to abortion, is that of religious liberty. The hidden assumption in the bills which you have sponsored to "prohibit abortions" is that the fetus is, in fact, a human being or a person in the Constitutional sense of that term. This was the problem with which the Supreme Court struggled in 1973 and concluded that there is no consensus on this question in the United States.

There is not even a consensus among religious groups in the United States. Your committee, for instance, has heard from Dr. Adrian Rogers, pastor of the Bellevue Baptist Church in Memphis, Tennessee, who has supported your effort to proscribe and prohibit abortions at law. I speak as another Baptist who sees the issue quite differently. Baptists, like other religious groups, are divided on this question as to the personhood of the fetus. We are all concerned about the morality of abortion, but many of us believe that to pass a law based upon the religious dogma or doctrine that a fetus is a human being, does violence to the Bill of Rights' guarantee of religious liberty. This is the establishment of religion by legislating a religious dogma. Laws have no business telling Americans what they must believe in religious matters. This is a freedom guaranteed by our constitution. S. J. Res. 17 attempts to apply the 5th and 14th articles of the admendment to the constitution to "unborn offspring at every age of their biological development." This is preposterous and totally unacceptable to many of us on religious and moral, as well as legal grounds. For theological and ethical reasons (which I spelled out in detail before the subcommittee on the separation of powers in June), I find this notion offensive and totally unacceptable. If I may speak of Biblical grounds for a moment, I also found it totally inconsistent with the Biblical witness.

I know also that my Jewish friends in the Reformed and Conservative tradition do not accept this definition of the fetus as a person. It is a serious infringement of their religious liberty for us now to prohibit access to legal abortion.

Thus, while many of us will disagree on the issue of the personhood of the fetus, the requirement of religious liberty is that our religious differences be respected by those who disagree with us until we can reach a consensus on the matter. While we may find other people's views offensive, distasteful and even immoral, religious liberty requires that we not impose upon them a religious point of view that they do not share. I find a number of Catholic doctrines totally unacceptable. I would insist, however, upon their right to believe as their tradition teaches. I would never, even if it were within my power, attempt to legislate their doctrine for them.

As a Baptist who appreciates the heritage of religious liberty and the costly battles that have been fought in order to retain that precious freedom, I sense an ominous danger in bills such as this. Very few Americans (less than 17% by recent polls) accept the notion that the fetus is a human being from the moment of conception. This is a philosophical or religious assumption, however, that cannot be proven or disproven except on the basis of assumptions or presuppositions that the opposition does not accept. I can live with the fact and support the right to believe this notion by that minority of our citizens. I respect their right to disagree with me.

I would equally insist, however, upon the right to be able to dissent from their point of view. The termination of a fetus may be tragic, but it is not, in my judgment, the murder of a child or of a human being. This is certainly true within the first trimester, though I would argue that it becomes increasingly problematic during gestation. For myself, I believe that, after viability, the fetus should be regarded as a person in the constitutional sense. I would even want to be on the safe side of that, making approximately the twenty-second week of pregnancy the point at which abortion should not be available on demand. I certainly do not have a laissez-faire attitude toward abortion on demand. Even so, we must exercise care in imposing our moral and religious judgments through law upon people whose circumstances we do not share, may not understand, and whose religious presuppositions are different than ours.

I therefore want to go on record with you and with your committee, opposing these various bills because of the specific way they are attempting to go about a problem which we all recognize. Constitutional problems abound in these particular efforts. I would hope that a further study on your part of the relationship between religious dogma and law might illuminate the concern which I am raising. In all of our concern to limit access to abortion, we must also be concerned for preserving the religious liberty which is a precious heritage in our country. To do less is to do more harm than good.

I would work with you and support an effort to pass a law to proscribe abortion at or about the time of viability. On this, most Americans can concur. We would have a widespread consensus for this approach. This would limit access to abortion during that era of gestation when the notion of the personhood of the fetus is least debatable. It would also grant sufficient time during the early stages of pregnancy for any woman, regardless of the circumstances under which she became pregnant, to decide that she does not want to bring a fetus to term. It seems to me that such a law would preserve all the values about which I am speaking. It would be equitable, based upon a consensus in religious and political communitites, and legally enforceable. It would rectify our concern about the widespread abuse of abortion on demand without destroying religious liberty. It would recognize the need for access to legal abortion while restricting access to abortion when the personhood of the fetus must be taken into serious account.

I would very much appreciate the opportunity of sharing my concern before your committee in one of its sessions or hearings on this subject. If such an opportunity might be afforded, I would most appreciate that opportunity. You and your committee, as well as many others who read the news accounts, may have been misled by hearing Rev. Rogers say that he spoke as the immediate past president of the Southern Baptist Convention. No one speaks for all Southern Baptists. He should also have told you that Southern Baptists passed a resolution in 1969 calling for abortion law reform. Baptists have consistently stood for therapeutic abortion. The 1980 resolution which he cited was, in my judgment, an overreaction based upon widespread concern about the abuse of abortion on demand. I would think in all fairness that your committee should make available a time to hear from another concerned Baptist on this issue.

Thank you for your attention on this matter. I will appreciate hearing from you in response to the concerns which I have raised.

Sincerely yours,

Paul D. Simmons

Paul D. Simmons
Christian Ethics

PDS:bc

TESTIMONY

submitted by

THE CENTER FOR POPULATION OPTIONS

December 9, 1981

The Center for Population Options (CPO) is a private, non-profit agency based in Washington, D.C. Our primary focus is public education about adolescent fertility and reproductive health; five current projects address this issue through local, national and international projects which work through the media, youth serving organizations and an international network of professionals.

CPO opposes all constitutional amendments designed to nullify the Supreme Court's Roe v. Wade decision. We believe that abortion should remain legal; in our opinion, to render abortion illegal will not end abortion but simply return the nation to the era when the procedure was illegally sought by women - often with negative health consequences.

Unintended adolescent pregnancies are a tragedy for both the individual and the nation. For many teenagers, having a child in these early years means an incomplete education. This in turn contributes to diminished employment opportunities, lower income than other families or unemployment. In addition, the children of teenage mothers tend to have children when they become adolescents. This cycle of adolescent childbearing has not only social but economic consequences as well. Economic analysts, as reported by The Alan Guttmacher Institute, estimate that it costs taxpayers $75,000 to raise a child on welfare.

We urge the Committee to recognize the benefits of the Roe v. Wade decision.

Judith Senderowitz
Executive Director
Center for Population Options

Statement
submitted by
the Center for Population Options
to the
Subcommittee on the Constitution

January 15, 1982

The Center for Population Options objects to SJ Res 110, the "Human Life Federalism Amendment", and we would appreciate the inclusion of our comments in the Subcommittee's record.

The Center for Population Options is the only national organization whose primary purpose is to reduce the incidence of unintended adolescent pregnancy and childbearing, which is a problem of enormous dimensions. Critical to our goal is insuring that adolescents have the information and service options they need for responsible reproductive decisions. It is imperative that the right to safe and legal abortion be maintained.

CPO's objections to SJ Res 110 are numerous and varied, and stem from concern over both the human and constitutional impact of this legislation. CPO takes issue with the "Human Life Federalism Amendment" for the reasons detailed below.

The American public does not support anti-abortion legislation. It is also apparent that the Congressional majority necessary to pass explicit anti-abortion legislation does not exist. CPO therefore views SJ Res 110 as a circuitous route aimed at the implementation of anti-abortion legislation that would be representative of the views of only a fraction of the population.

A successful vote or SJ Res 110 will cause the alteration of the legal framework under which future abortion legislation will be considered. If Roe v. Wade is reversed by the passage of SJ Res 110, human life statutes (such as pending S. 1741) could be enacted by simple one-vote majorities at either the state or federal level, and would be immune from constitutional challenge as well as insulated from the scrutiny of the Supreme Court. SJ Res 110 does not reflect a concensus on the issue of the right to abortion; rather, it established a procedural framework designed to avoid direct consideration of an explicit anti-abortion amendment while still achieving the objective of illegalizing abortion. The Center for Population Options thus views SJ Res 110 as a dangerous precedent with implications that transcend the abortion issue. If successful, the mechanism embodied by SJ Res 110 will pose a threat to other fundamental rights, which, like abortion, are presently guaranteed by the Constitution.

The Supreme Court's ruling in Roe v. Wade determined that a woman's decision to terminate her pregnancy is a right protected by the Constitution. Thus, the attempt undertaken by SJ Res 110 to turn it into a legislative matter constitutes a monumental attack on the basic tenet on which our country was founded. SJ Res 110 would deny the existence of certain inalienable, fundamental rights to which every individual is entitled. The nature of these rights is by definition permanent, and precludes any alteration effected by the changing whims, and the political expendiencies which foster them, of any transient legislative body. If enacted, SJ Res 110 will be the only existing amendment that operates to retract personal liberties that were once guaranteed; all others have altered the Constitution in order to effect an extension of individual rights.

The "Human Life Federalism Amendment" also contradicts the Constitution's Supremacy clause by initiating the ability of a state law to take precedence over a federal law when the state law is the more restrictive. Historically, federal statute prevails when conflicting with state law. Yet under SJ Res 110, the supremacy of the state law is not constant; it does not apply if the federal law is more stringent. Thus a state choosing to permit abortion could have its desire abrogated by federal statute.

When reviewed, the intent of the so-called "Human Life Federalism Amendment" is clear: its goal is to outlaw abortion. SJ Res 110 can in no way be construed as a compromise. The most effective and justifiable compromise on this issue is already in existence, and respects the divergent convictions of the American people. Under the Supreme Court's Roe v. Wade ruling, no one is forced to have an abortion, no doctor is forced to perform an abortion, and no medical facility is forced to provide abortion services. As Professor Lawrence Tribe of Harvard University has effectively stated, "private choice can be most plausibly defended as our Constitution's way of reconciling the irreconcilable without embroiling Church and State in one another's affairs".

Finally, making abortion illegal would exacerbate the tremendous problem of unwanted pregnancy. The Center for Population Options feels that the passage of SJ Res 110 will condemn children to be born of children and women to subject themselves to unskilled physicians in unsanitary conditions, In both cases, the health and the lives of women will be at stake. Irreversible poverty cycles will result from teenage parents forced to drop out of school who will have resultant low income potential and must rely on welfare programs. In no way can a constitutional amendment eradicate the compelling circumstances that lead women to terminate their pregnancies; in no way can it provide infallible contraceptives or perfect human behavior. No constitutional amendment will prevent abortion - it can only stop those that are legal and safe.

For all the reasons offered in this statement, the Center for Population Options feels that abortion should remain a matter of personal choice.

STATEMENT TO THE SENATE SUBCOMMITTE, January 12,1982

Eleven years ago I signed the death warrant for my unborn son or daughter. I was twenty-one years old and had, to say the least, been living a very irresponsible life-style. I was given only one answer to the problem of my untimely pregnancy: that of abortion. The money was placed in my hand, the arrangements made and I traveled by bus to a legal abortion clinic in New York city. The clinic was sterile, cold and adequately professional. I was examined by a physician, signed a release form and waited for my turn in line. There was no counseling or explanation of the procedure to be used, let alone the possibility of danger to my physical health.

Since I was over four months pregnant at that time and the type of abortion performed on me was suction and curretage,not all of the baby was removed from my uterus. I began to run a fever after my return home, was hospitalized, underwent a Dand C operation and I hemorraged for almost a month along with a weight loss of twenty-five pounds. I managed to somehow completely bury the whole incident for almost six years.

At the time that my abortion experience surfaced, I was married and had two beautiful children. I was watching a 700 Club special in which they presented time lapse photography of the development of the child form conception to birth. Following this, the procedures of abortion and what each one does to the child. It is extremely difficult to explain to you what happened in my heart and mind at that time but it was as if the weight of the whole world came crashing down on my shoulders.

At first, I was stunned. Then I felt stupid about my ignorance of what the word abortion actually meant. I could not put it all into perspective; I knew that I was responsible for killing my child.

There were two factors that helped me maintain my sanity. The first was the knowledge that my children depended on me and I had to keep going- I couldn't afford to escape into myself. The second was the fact that I had a developing trust in God and I knew that somehow I could find forgiveness from Him. The hope of forgiveness eventually turned into a reality. Forgiving myself was the most difficult and living with the memory of my act, every day, for the rest of my life, has not been easy, either.

I share these facts with you not to induce pity nor to escape from my responsibility for my own actions. In the years that have followed, I have been able to help other women through what has happened to me. That is why I am so involved with 'Women Exploited', a group that was formed in 1975 to help women who have had abortions and regret them.

Since I founded the Tidewater chapter of WE in May, 1981,I have worked and counseled with many women that the tradgedy of abortion has touched. I become more convinced with each new contact, that there must have to be a way to stop this atrocity in our nation. It is inconceivable to me that 1.5 million babies can be murdered in this country and that we, as a nation do not scream out to stop it.

I receive letters from all over the country and Canada from women who want to be heard. They cannot understand why they were not counseled by abortion clinics, Planned Parenthood,and Family Planning organizations. They cannot understand why there is not a more comprehensive educational program at work in our schools to teach and alert young people to the dangers of abortion and what happens to the new life in the process. They cannot understand why it is that pro-abortion representatives are allowed in various school systems and pro-life people are not.

I cannot be convinced that the abortion controversy will ever end. I believe that the government and our lawmakers must intervene and change the laws before it is too late. So many lives have already been lost and so many women's lives had irreversible damage done to them- I must, in good faith and conscience, support the Hatch Ammendment. I pray that this will be the first of many positive steps taken to stop the mass slaughter of the unborn in this nation.

May God bless and grant wisdom to you all.

To Life,
Vicki L. McMillan
1068 Bland St.
Norfolk, Va. 23513

Vicki L. McMillan
January 12, 1982

Director, Women Exploited
Tidewater, Virginia Chapter

NFPRHA National Family Planning and Reproductive Health Association, Inc.

STATEMENT

SUBMITTED TO THE

SUBCOMMITTEE ON THE CONSTITUTION

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NOVEMBER 9, 1981

The National Family Planning and Reproductive Health Association (NFPRHA) is a non-profit membership organization headquartered in Washington, D.C. devoted to the improvement and expansion of the delivery of family planning and reproductive health care services throughout the United States. It is the largest organization in the nation composed of providers and consumers of family planning and reproductive health care services. Our members are committed to establishing and maintaining reproductive health care as a high priority preventive health care service in this country.

NFPRHA believes that comprehensive reproductive health services, education and counseling, including abortion, should be available to all individuals regardless of their economic status. We believe that it is of primary importance that the needs and rights of all persons seeking family planning and reproductive health care services, education and counseling be met with sensitivity and concern for their physical and mental well-being. Finally, we believe that reproductive freedom is one of the most fundamental human and civil rights.

NFPRHA recognizes its responsibility to uphold this right, basic to all, and must actively oppose any erosion of reproductive freedom and any restriction of access to comprehensive family planning and reproductive health care services.

Therefore, the National Family Planning and Reproductive Health Association, along with a sizeable majority of Americans, strongly opposes the consideration and passage by the Congress of the United States of S.J. Res. 110, which would overturn the 1973 Supreme Court rulings and provide Congress and state legislatures authority "to restrict and prohibit abortions;" S. 158, which would establish that "human life shall be deemed to exist from conception;" all other proposals to constrict the availability of abortion and other reproductive health care; and all proposals to define the point at which "human life" begins. Such a definition is impossible to legislate, since there is no consensus among religious leaders, scientists, philosophers, ethicists, medical professionals, politicians or any other segment of our society as to when "human life" begins.

Any of the proposals would, if enacted, severely restrict reproductive freedom in this country. Abortion would, or could, become a federal or state crime, in contradiction to the fundamental right proclaimed by the Supreme Court in its 1973 rulings in Roe v. Wade and Doe v. Bolton. Various contraceptive and prenatal practices and methods could also be outlawed. In addition, such proposals present a host of other not-completely-understood, but potentially far-reaching, ramifications in the areas of medicine, law, economics and ethics.

Thus, the National Family Planning and Reproductive Health Association, representing those who are most directly involved with the provision and receipt of family planning and reproductive health care services -- those who are most likely to be affected by the passage of a "human life amendment" or "human life statute" -- urges the Senate Judiciary Committee's Subcommittee on the Constitution, and the entire United States Congress to reject all proposals that would seek to limit reproductive freedom, as S.J. Res. 110, S. 158, and other similar bills and Constitutional amendments would do.

Statement to the Senate Subcommittee
on the Constitution
and
Chairman, Senator Orrin Hatch

from
Indiana Right to Life, Inc.

Indiana Right to Life is a non-profit, grassroots organization comprised of local affiliates volunatrily united in association, and coordinated by Indiana Right to Life, for the common purpose of protecting the inalienable right to life of innocent human beings.

The Indiana Right to Life organization is presently comprised of 60 county chapters organized for the express purpose of serving all innocent human beings at all stages of biological development in danger of death from abortion, infanticide and euthanasia.

Because of the growth of our organization, and because we believe in long-range planning, our organization has come together to project our goals and objectives for the next two years. The Legislative Goal adopted by Indiana Right to Life reaffirms our purpose by working for legislation that will seek legal protection for all innocent human life.

We are pleased to see hearings being held on the Human Life Amendment, and we commend you, the committee members, for having this issue as one of your priorities.

The Board of Directors of Indiana Right to Life has voted to support the Human Life Bill or Statute, as an interim step to a Human Life Amendment to the Constitution.

The Board of Directors has also voted and is on record as supporting an amendment which would address personhood.

We, therefore, request that serious consideration be given to the Amendment submitted to your committee by the National Right to Life Committee, which would not only prohibit abortion, but advocate the right to life of unborn children by the law's protection of their lives, a right equal to that of any other person.

Statement Opposing S.J. Res. 110

by

Richard D. Lamm, Governor

State of Colorado

INTRODUCTION

The purpose of this statement is to express my opposition to the passage of Senate Joint Resolution 110, a constitutional amendment which has the purpose of prohibiting abortion in the United States. My concerns focus on the deceitfulness of this amendment, the constitutional and legal conflicts which it will provoke, and the human misery it will inflict. At best, S.J.R. 110 is a dishonest attempt to disguise the real purpose of its sponsors. At worst, it represents abandonment of an honorable principle - the protection of life - for the expedient accomplishment of an unknown and possibly capricious result.

Section I

The portion of S.J.R. 110 which states that a right to abortion is not secured by this Constitution is in fundamental conflict with Roe v. Wade and other United States Supreme Court decisions upholding the "fundamental right of privacy... (which) encompasses her right to decide whether to terminate her pregnancy". The medical definitions of abortion, the circumstances surrounding both spontaneous and induced abortion, and the known facts of biology make withdrawal of the right to decide concerning abortion, or the right to obtain one, an exercise fraught with grave constitutional issues. What other civil rights would be swept away along with the right to privacy? To what extent can the state or federal government enter the bedroom or physician's office in order to interfere with private acts and decisions?

One of the first steps in the passage of any law is a clear demonstration of its need. Opposition to choice in abortion is based entirely on religious and philosophical grounds and not on any known facts of public health. In fact, medical research has repeatedly shown early abortion to be far safer than term pregnancy with regard to the woman's medical risk. Furthermore, according to a recent NBC/~~UPI~~ AP poll, only 10-15% held the view that abortion should be prohibited.

Another step in the passage of any public law is the determination that there is a reasonable probability of enforcement. The technology of abortion is now widely available to both physicians and non-physicians alike. Suppression of this technology would be impossible without setting up an enforcement mechanism that would interefere with many other aspects of accepted medical practice. Thousands of physicians view the termination of pregnancy as an important alternative in the care of women who are pregnant, including those who wish to be pregnant but who have important medical risks. In some communities, up to one-half of all women who become pregnant choose to terminate rather than continue their pregnancies, with a national total of 1.5 million abortions per year. At the very least, these numbers indicate that there are important differences of opinion among members of our society concerning the acceptability of abortion.

Prior to 1967, when Colorado's first abortion reform law was passed, and indeed, prior to the 1973 Supreme Court decision, state abortion laws were largely ignored. Doctors and patients found ingenious and unlimited ways to circumvent these laws. The arrangement did nothing to encourage respect for the law or for the integrity of medical practices. The only effect was to penalize the poor with unsafe abortions performed under humiliating and unhygienic conditions.

Section II

The second portion of S.J.R. 110, which attempts to provide concurrent power of the Congress and states to restrict and prohibit abortions, is highly mischievious. It qualifies a so-called "states' rights" provision with the stipulation that the more restrictive law will govern. First, this exposes the fact that Congressional restriction will prevail even in states that do not wish to restrict or prohibit abortion; second, it raises important jurisdictional issues that would create serious disputes in the courts. For an amendment that purports to place the decision back in the hands of the legislatures, this would be a most unfortunate and undesirable result. It would unquestionably result in many grave constitutional issues, not the least of which would be confusion over federal-state relations.

Even without these jurisdictional disputes, S.J.R. 110 would assure a discriminatory and uneven access to safe abortion throughout the United States. There is no more justification for this objective than discriminatory access in other aspects of medical care. A man suffering from a broken bone in Connecticut is no different in his medical needs than a man with the same condition in Texas. A woman who needs an abortion in Colorado is no less deserving of good medical care than a woman in New York. Congress has not demonstrated any superior competence in determining the conditions of any aspect of medical care, much less abortion.

Other Ramifications

Prior to the legalization of abortion, nearly half of all maternal deaths were due to induced abortion in some areas of the country. Since then, legalized abortion has become a safe medical practice and the present risk of death due to early abortion is less than one per million procedures. The risk of death from abortion today is even less than the risk for mothers carrying babies to term, which is 14 per 100,000 live births. The improved safety of abortion is almost entirely due to its legalization, which permitted the development of improved techniques and skills.

The effect of S.J.R. 110 would be to encourage the criminalization of abortion either by the states or the federal government. We would probably return to the conditions that existed prior to legalization. Abortions once again would be performed in "back alleys" and low income people would bear the brunt of the restrictions more heavily than others. Moreover, "Human Life" - type statutes, if enacted under this constitutional amendment, would prevent the use of birth control devices that interfere with the implantation of a fertilized egg (declared to be a person) such as the intrauterine device. In the same way, medical procedures which can cause spontaneous abortion, such as amniocentesis, certain medications, and radiation, may be found to be illegal. Nothing in S.J.R. 110 prevents any of these possibilities from being raised in the courts.

The result of women carrying "high-risk" pregnancies to term would be an increase in the maternal and infant complications and mortality. Much of the financial burden of this would fall on the taxpayer at a time when government programs are being severely cut.

Teenagers may be more affected by this legislation than any other category of "high-risk" pregnancies. Young women would be forced to continue unplanned pregnancies for which they are totally unprepared. While one-third of all abortions are now performed on teenagers, more than 90 percent of teenage mothers who do give birth choose not to give up their babies for adoption. Yet, those who choose to bear their children often find themselves unprepared for the responsibilities of parenthood. Thousands more teenage mothers would be forced to give birth to children for whom they are not prepared.

Finally, women who are pregnant because of incest or rape will not be able to abort fetuses clearly created against their will. What kind of society have we created which would say that a woman must bear the full consequences of a rapist or an immoral father or brother?

CONCLUSIONS

While S.J.R. 110 has great appeal both to those who wish to profit politically from opposition to abortion and those who wish to evade the issue, it is not an honorable or fair approach to this public debate. I respect and may even admire those who would "protect life" and who see this amendment as a method for doing so. Where we differ is in our application of that honorable principle. We may also differ in our willingness to confront this issue.

When the federal government may supercede state law in so private a matter as medical practice, how far is this principle extended in other matters of public policy? How is the "restrictiveness" of the laws to be determined? Who will make this determination? What if the restrictions themselves are declared to be unconstitutional? How are any laws against abortion to be enforced? Since restrictive federal laws are always to supercede less restrictive state laws, who will enforce the laws in these cases?

S.J.R. 110 is clearly an attempt to overrule the Supreme Court's interpretation of the Constitution. If it is passed and ratified, S.J.R. 110 would give the States the power to prohibit the performance of abortions and also probably would prevent States from allowing abortions to take place. Whether or not to bring a new life into the world is a private decision to be made between a woman and her doctor. I consider it strange, indeed, that proponents of less government would urge so massive an intrusion of government into private affairs.

Prohibiting abortions by statute would not stop women from obtaining abortions. On the contrary, abortions would return to the back alley, where risks to women would increase manifold. I cannot support this amendment which seeks to remove the protection given women by the Constitution. Clearly, the outcome would not be to protect human life. To the contrary, we are now protecting human life by providing safe, legal abortions for women. Moreover, we are not interfering in the constitutional right of women to make such a choice on their own. The decision of the United States Supreme Court setting forth constitutional guidelines which protect the rights of women and of society alike should not be overridden by the constitutional amendment proposed in S.J.R. 110.

PIONEER WOMEN
THE WOMEN'S LABOR ZIONIST ORGANIZATION OF AMERICA, INC.
200 MADISON AVENUE / NEW YORK, NEW YORK 10016 / TEL: (212) 725-8010

December 22, 1981

Testimony to be offered to the Senate Judiciary
Subcommittee on Constitution in opposition to the
Human Life Federalism Amendment (SJR 110)

Pioneer Women/Na'amat, the Women's Labor Zionist Organization of America, a non-profit volunteer organization of 50,000 American women, voice opposition to Senator Hatch's amendment SJR 110.

In our 56-year history, we in Pioneer Women/Na'amat have been concerned with the health, education, and well-being of women and children in the United States and Israel. We are an organization of women which strongly believes that women shall have the right to make their own decisions affecting their lives.

The "Human Life Federalism Amendment" reads: "A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: Provided, That a law of a State which is more restrictive than a law of Congress shall govern." It, therefore, grants both Congress and individual states the power to ban abortion by majority vote. It is a regressive measure that serves to reverse the Supreme Court's decision in *Roe v. Wade*. That decision was neither pro- or anti-abortion. It was a clear statement that the issue of abortion was a matter of personal concern--to be decided by the woman and her physician, not the state. Here we are today, some years later, with the prospect that, once again, the state would assume responsibility in this area.

Our reasons for opposing Senator Hatch's amendment are manifold. We see that passage of the amendment will not eliminate the need for abortions. Consider that in 1979 over 1.5 million women had abortions; an additional 650,000 women desired abortions but were unable to receive them because of geographical and financial constraints. We are therefore speaking about an annual rate of nearly 2 million women desiring abortions. The amendment will make *safe* and legal abortions a thing of the past. Statistics point out that since 1967, 15% of all American women of reproductive age have had abortions. This number includes women of all socio-economic groups. Desperate people who need abortions will do desperate things.

On an ideological level, we object to the Hatch Amendment on the basis that it is an invasion of our privacy. Issues such as the decision to abort are personal. The decision to have an abortion is a complicated question that raises mixed feelings, one that is usually made after careful reflection and discussion with one's physician and family. It is not a matter for the public domain.

As a Jewish organization, we accept the traditional Jewish belief that life begins at birth and that the life of the mother is more important than the life of the fetus. We want the continued freedom, guaranteed by our Constitution, to practice this belief without intervention from Government.

A further objection to the Hatch Amendment, as it currently stands, is that there are no exemptions for specific instances. There is no guarantee that that victims of rape or incest would receive abortions. Only as a last resort, to avert the death of the mother, could medical abortions be performed. All of the national polls have consistently shown that the majority of Americans favor the right to choose abortion in cases such as these.

This type of legislation reflects regressive social planning. If passed, the Hatch Amendment would undoubtedly create certain states which would become, in Senator Hatch's own words, "abortion havens." Accessibility to the states where abortion would be legal would be reserved to those who could afford the privilege of a legal abortion.

We urge the defeat of this Amendment.

STATEMENT BY THE AMERICAN ETHICAL UNION ON S.J. RES. 110

In accordance with a resolution originally adopted at the 1973 Annual Assembly of the American Ethical Union, which was reworded and reaffirmed at the 1979 Assembly, this organization strongly opposes S.J. Res. 110.

The resolution as reworded in 1979 follows:

The American Ethical Union wishes to express its disapproval of efforts to amend or circumvent the United States Constitution in such manner as would nullify or impede the decision of the United States Supreme Court regarding abortion. We further believe that denial of Federal or State funds for abortion where they are provided for other medical services discriminates against poor women and abridges their freedom to act according to their conscience. The American Ethical Union supports the expansion of governmental family planning services as a means of reducing the need for abortions.

TESTIMONY OF CLYDE R. SHALLENBERGER
ON BEHALF OF THE CHURCH OF THE BRETHREN GENERAL BOARD

Mr. Chairperson and members of the Senate Judiciary Subcommittee on the Constitution: I am Clyde R. Shallenberger and I live at 228 Tyrone Circle in Baltimore, Maryland 21212. I am the Director of the Chaplaincy Service at the Johns Hopkins Hospital in Baltimore. For seven years I was the Chairperson of the General Board of the Church of the Brethren and it is in the name of that Board that I present this testimony to you. The General Board is the highest administrative body of our denomination of approximately 1,000 congregations with headquarters in Elgin, Illinois.

I speak in strong opposition to any Constitutional Amendment which would do violence to the January, 1973 action of the Supreme Court decision related to abortion. That Court gave intense and unemotional consideration to the issue of abortion and, in effect, lifted all restriction on a woman's right to a physician-performed abortion prior to the viability of the fetus. Unlike the Court, you are under pressure from a variety of sources to deny the freedom of choice that the Court deemed to be the right of women.

1. PERSONAL RIGHTS. The decision to have or not to have an abortion should be that of the pregnant woman after consultation with an appropriate physician. No one else is in a position to make that decision for her. It is assumed that in addition to competent medical advice she will also have received some counseling about the alternatives available to her, but the decision must ultimately be hers. No other medical procedure is restricted by legislation. With all due respect to the abilities of the distinguished members of the Congress, they ought not get into the practice of medicine by law.

2. ABORTIONS WILL NOT GO AWAY IF THEY ARE MADE IllEGAL. The assumption made by supporters of anti-choice legislation is that if legislation is enacted to make abortions illegal they will disappear. This is not so, as indicated by the number of (illegal) abortions that were done in this country before the 1973 action of the Supreme Court. The only thing that making abortions illegal will do is to drive women to back alley abortionists and endanger their lives.

As long as there are women there will be abortions. Therefore, is is important that abortions remain legal in order to assure that the woman being aborted has opportunity to have that abortion done by competent medical personnel in adequate clinics and/or hospitals and supported by skilled pre- and post-abortion counsel.

One of the memories burned into my mind, as the Senior Chaplain of a world respected medical center, is that of a beautiful twenty year old black girl who could not get a legal abortion in Pennsylvania. So, she went to an illegal abortionist in that state and she soon became septic. She was admitted to the Intensive Care Unit of the Johns Hopkins Hospital and I, literally, held her hand while she died. Had she had her abortion legally and in an appropriate facility by adequately trained personnel she would, no doubt, be alive today. Didn't she have a "right-to-life," too?

3. ANTI-ABORTION LAWS ARE, BY NATURE, DISCRIMINATORY. Laws that would eliminate or severely restrict abortions discriminate against the poor. It has always been possible for women with financial means to obtain an abortion even if it meant travel outside the country to do so. Women who do not have such funds available to them would be discriminated against if restrictive abortion laws were enacted. Such a woman would have to go to a "butcher abortionist" whose motivation is making money and not caring for the woman...or bearing a child that is unwanted and that would, in all probability, be one of the increasing numbers of unwanted children.

4. NO AGREEMENT AS TO WHEN LIFE BEGINS. Those pushing for anti-abortion legislation make the assumption that life begins at the moment of conception. This is not supported by the biological sciences. Life's beginning is a process as is death; it does not occur at a precise moment. Furthermore, to define conception as the beginning of life would rule out the commonly and acceptably used birth control methods such as intrauterine devices and the "morning-after" pill. There is no consensus as to when the fetus becomes viable, i.e., able to survive extra-uterine.

5. THE FETUS IS HUMAN BUT NOT A PERSON. Legally, and otherwise, a fetus has no status as a person. If the law is changed to make it so then it is possible that such fetuses will have to be counted in census-taking, would be eligible as income tax deductions, etc.

The fetus is human, since it is human tissue, but it is not a person according to the definition of persons as defined by the United States Constitution. Since the fetus is not legally a person, abortion cannot be considered to be murder as some anti-abortionists declare. In murder there must be a victim, a person. The Constitution does not give that status to a fetus.

6. RELIGIOUS FREEDOM. To enact restrictive anti-abortion laws would be to legalize the doctrine of one major faith group, while denying to other equally sincere and conscientious groups the freedom of their religious conscience and their right of choice.

On the one hand, I would adamantly oppose any attempt to force an abortion on any woman. No one has the moral, ethical or legal right to do so. But on the other hand no one has the moral, ethical or legal right to deny that right-of-choice to any woman. The January, 1973 action of the Supreme Court rightly puts the burden of decision where it belongs.

I trust that you will not be pressured by those persons who would seek to deny by legislative fiat American women their rights and force upon them the moral restrictions of those who are opposed to abortion. The right to have an abortion is just as important as the right not to have an abortion. Neither decision should be made by the legislative process but, rather, by the free conscience of every woman who is confronted with an unwanted pregnancy.

In 1972 the highest delegate body of our denomination adopted the "Annual Conference Statement on Abortion." This paper recognized the sacredness of all human life by stating, "Brethren oppose abortion because it destroys fetal life. Let it be clear that the Brethren ideal upholds the sacredness of human life and that abortion should be accepted as an option only where all other possible alternatives will lead to greater destruction of human life and spirit." The statement further asked that "laws regarding abortion should embody protection of human life, protection of freedom of moral choice, and availability of good medical care. Brethren should work for laws that uphold these principles, even though there are differing opinions as to how such principles may be achieved. Brethren are asked not to try to enforce their highest ideal of morality by strict civil law." A copy of that statement is attached.

I hope that your respected body will have the same courage and use the same wisdom as manifested by the Supreme Court in its 1973 action protecting the freedom of choice for all women.

STATEMENT
of the
AMERICAN MEDICAL ASSOCIATION
to the

Subcommittee on the Constitution

Committee on the Judiciary

U.S. Senate

Re: Amendments to the Constitution to Restrict or Prohibit Abortions

December 14, 1981

The American Medical Association takes this opportunity to express opposition to the proposals before the Committee that would amend the Constitution of the United States to allow restrictions on or prohibit the performance of abortions.

We understand the purpose of the proposals before the Committee is to overturn the decision of the U. S. Supreme Court holding that a woman has a constitutionally protected qualified right to an abortion. Our concern is that women could potentially be denied a necessary medical procedure. We are also concerned with the precedent for and the possibility of improper interference into medical practice by singling out a medical procedure for prohibition or restriction in the form of a Constitutional amendment.

Abortion is a recognized medical procedure and the medical indications for abortions are numerous. In testimony before the Subcommittee on Separation of Powers of the Judiciary Committee, we offered our detailed comments concerning the medical implications that would result from a ban on abortion. Not only could adverse effects be sustained by the mother when the life of the mother is in danger, but also by the fetus when medical treatment for the benefit of the mother adversely affects or irreparably harms the fetus. We have enclosed a copy of that statement for inclusion in the record of this hearing in order to highlight these medical concerns.

We are concerned with Senate Joint Resolution 110, not only with the authority for total prohibition, but also with the authority to place restrictions. We believe that any regulatory or other scheme designed to determine the legality of "allowable" abortions would improperly interfere with the confidential and personal physician-patient relationship. Any system that would be used to determine the legality of an "allowable" abortion would bring persons who administer these provisions or the courts into the position of second guessing and potentially overruling a physician's determination as to medical necessity and the course of medical treatment for his or her patient. We believe that such an invasion of privacy and the limitations on good medical practice are unacceptable. Therefore, we must oppose all of the proposals on the subject pending before the Committee.

Board of Church and Society
The United Methodist Church

December 14, 1981

The Honorable Orrin Hatch
Chair, Senate Subcommittee
on the Constitution
U.S. Senate
Washington, D.C. 20510

Dear Sir,

I, on behalf of the Board of Church & Society of the United Methodist Church, would like to place into the rocord of hearings for S.J. Res. 110 the following statements:

As the social action arm of the church, we have been directed by elected representative from all of our annual conferences to speak out against the proposed constitutional amendments that deny any aspect of choice to women and their families in terminating pregnancies. The United Methodist Church has a long-standing commitment to freedom of choice and responsible parenthood and opposes any attempt to retreat from the 1973 decision of the Supreme Court on said matter. We defend the separation of powers and do not wish to weaken this U.S. system that has historically served the people well.

Attached are three additional statements made by (1). The United Methodist Council of Bishops (2). The General Conference of the United Mehtodist Church (elected representative of each annual conference). (3). The Board of Directors of the Board of Church and Society (elected representative from each annual conference).

Shalom,

Beverly Roberson Jackson

Beverly Roberson Jackson
Director, Department of Human Welfare
Board of Church & Society

BRJ:wsm

Committed to Christ — Called to Change
The United Methodist Building ■ 100 Maryland Avenue, N.E. ■ Washington, D.C. 20002 ■ (202) 488-5600

American bishops who are members of the Council of Bishops of The United Methodist Church, meeting in Pittsburgh, Pennsylvania, November 16-20, 1981, reaffirm our belief in the family as "the basic human community". We further reaffirm the Social Principles of The United Methodist Church which say:

> Our belief in the sanctity of unborn human life makes us reluctant to approve abortion. But we are equally bound to respect the sacredness of the life and well-being of the mother, for whom devastating damage may result from an unacceptable pregnancy.

Because there may be extreme circumstances that warrant abortion, and because we do not believe the Constitution of the United States should reflect particular religious or sectarian points of view, we stand strongly opposed to a constitutional amendment designed to prohibit abortion.

RESOLUTION OPPOSING A CONSTITUTIONAL AMENDMENT BANNING ABORITONS

The right to choose safe, legal abortion has been affirmed by the United Methodist Church's General Conferences of 1970, 1972, 1976 and 1980 through resolutions and in the Social Principles. Safeguarding that right is seen as a preservation of religious liberty.

As the Social Principles states, "In continuity with past Christian teaching, we recognize tragic conflicts of life with life that may justify abortion." The resolution on Responsible Parenthood elaborates: "We believe that continuance of a pregnancy which endangers the life or health of the mother or poses other serious problems concerning the life, health or mental capacity of the child to be, is not a moral necessity. In such cases, we believe the path of mature Christian judgement may indicate the advisability of abortion. We support the legal right to abortion as established by the 1973 Supreme Court decisions."

Anti-abortion groups have been working since those 1973 decisions to pass a constitutional amendment is closer to becoming a reality than ever before. Several versions of a so-called "human life amendment" have been introduced in the United States Congress and more members of the House and Senate than ever before have stated their support for such an amendment. Passage of any of the versions of the amendment would not only impose a ban on all abortions but would also have the effect of prohibiting the use of certain forms of contraception (the birth control pill and the IUD), due to the language which declares that fertilized eggs are persons, entitled to constitutional rights.

We believe that passage of a constitutional amendment banning abortion is abhorrent from several standpoints:

(1). The declaration that life begins at the moment of conception is theologically debatable and, if adopted as constitutional law, would violate the religious freedom of millions of Christians and Jews.

(2). A ban on legal abortions would return us to the days of unsafe, illegal abortions and thus pose a threat to the lives and well-being of all women --lives we, as Christians, hold dear.

(3). The language stating that fertilized eggs are persons, entitled to constitutional rights, leaves as highly likely the possibility that certain forms of contraceptions would become illegal. Our longstanding commitment to the right of couples to use safe contraceptive measures in responsibly controlling conception according to their circumstances thus becomes threatened.

We urge the Congress of the United States to reject any attempts to pass a constitutional amendment banning abortions. We further urge all concerned United Methodist to contact their Senators and Representatives and ask that they vote against any such legislation on the floor and in the appropriate committees and sub-committees.

Approved at the meeting of the General Board of Church and Society in Clarksville, Indiana February 1981.

National Alliance for Optional Parenthood
2010 Massachusetts Ave., N.W., Washington, D.C. 200036, (202) 296-7474

December 1981

OPPOSITION TO ANTI-ABORTION MEASURES

The National Alliance for Optional Parenthood (NAOP) opposes S.J. Res. 110, H.J. Res. 125, S. 1741 and all proposed measures which could have the effect of prohibiting or limiting the right of people to choose abortion. NAOP deplores these attempts to subvert the constitutional right to privacy which was re-affirmed by the Roe vs. Wade Supreme Court decision in 1973.

Specifically, the National Alliance for Optional Parenthood opposes these measures because they could deny women access to legal abortion. This position is supported by the following policy adopted by the NAOP Board of Directors on 17 September 1976:

> The National Alliance for Optional Parenthood, in accordance with its goals, supports the right of individuals to maintain a childfree lifestyle. To accomplish this in a manner consistent with the individual conscience, all methods of controlling one's fertility, including contraception, sterilization and abortion should be readily obtainable, legally available and a matter of personal choice.

The National Alliance for Optional Parenthood is a nonprofit educational organization founded in 1972. The primary purpose of NAOP is:

- To promote informed, thoughtful and unpressured decisions about whether to be a parent or to be childfree;
- To make the "childfree choice" a socially accepted and respected option.

These proposed measures would have a negative effect both on NAOP members who have decided not to be parents and those who are in the process of deciding about parenthood. By eliminating abortion and certain forms of contraception, they decrease the methods available to people to carry out their reproductive decisions.

Parenthood is too important and demanding a role to be left to chance. Reproductive options must be preserved in order to prevent the problems associated with unwanted births and to promote a high quality life for all citizens.

March 5, 1982

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

The undersigned organizations oppose passage of S.J. Res. 110, the "Human Life Amendment" designed to overturn the 1973 Supreme Court decision that the constitutional right of privacy, found in the concept of liberty guaranteed by the 14th Amendment, encompasses a woman's fundamental right to decide whether to have an abortion.

In cases dating back to 1891, the Supreme Court has recognized a constitutional right of personal privacy. Courts have long acknowledged the right to private decision-making in family matters, including the right of individuals to marry, to bear children and to use contraception, and the right of parents to raise and educate their children. In preserving these rights, individuals are protected from unnecessary government intrusion.

For years, abortion has been a divisive issue in American politics. Yet, recent public opinion polls unanimously indicate that, while many may not personally choose an abortion, the overwhelming majority of Americans consider abortion a private decision that should remain free from government intrusion.

We the undersigned organizations oppose and the American people oppose passage of legislation which attempts to undermine or reverse the 1973 Supreme Court decision.

Abortion Rights Mobilization
The Alan Guttmacher Institute
American Academy of Child Psychiatry
American Association of University Women
American Civil Liberties Union
American Jewish Congress
American Psychiatric Association
American Public Health Association
Americans for Democratic Action
Association for Women in Psychology
B'nai B'rith Women
Catholics for a Free Choice
Center for Constitutional Rights
Center for Population Options
Coalition of Labor Union Women
Committee for Abortion Rights and Against Sterilization Abuse
Committee to Defend Reproductive Rights
Federation of Organizations for Professional Women
International Ladies Garment Workers Union
Ms. Foundation
National Abortion Federation
National Abortion Rights Action League
National Alliance for Optional Parenthood
National Association of Commissions for Women
National Association of Social Workers
National Coalition Against Domestic Violence
National Council of Jewish Women
National Council of Negro Women

- National Education Association
- National Emergency Civil Liberties Committee
- National Family Planning and Reproductive Health Association
- National Federation of Temple Sisterhoods
- National Lawyers Guild
- National Organization for Women
- National Urban Coalition
- National Women's Health Network
- National Women's Political Caucus
- Newspaper Guild
- Physician's Forum
- Planned Parenthood Federation of America
- Reproductive Rights National Network
- Union WAGE
- United Church of Christ - Coordinating Center for Women in Church & Society
- U.S. Women's Health Coalition
- Voters for Choice
- Women and Health Roundtable
- Women for Racial and Economic Equality
- Women's Equity Action League
- Women's International League for Peace and Freedom
- Women's Legal Defense Fund
- Woman's National Democratic Club-PAC
- Women, USA
- YWCA of the U.S.A., National Board
- Zero Population Growth
- Religious Coalition for Abortion Rights
  - American Baptist Churches, National Ministries
  - American Ethical Union
  - American Ethical Union, National Women's Conference
  - American Humanist Association
  - American Jewish Congress
  - American Jewish Congress, Women's Division
  - B'nai B'rith Women
  - Catholics for a Free Choice
  - Church of the Brethren-Women's Caucus
  - Christian Church (Disciples of Christ), Division of Homeland Ministries
  - Episcopal Urban Caucus
  - Episcopal Women's Caucus
  - Federation of Reconstructionist Congregations & Havurot
  - National Federation of Temple Sisterhoods
  - National Federation of Temple Youth
  - Presbyterian Church in the U.S.-Committee on Women's Concerns
  - Presbyterian Church in the U.S.-General Assemby Mission Board
  - Union of American Hebrew Congregations
  - Unitarian Unversalist Association
  - Uniterian Universalist Women's Federation
  - United Church of Christ, Board for Homeland Ministries
  - United Church of Christ, Office for Church in Society
  - United Methodist Church, Board Of Church and Society
  - United Methodist Church, Women's Division, Board of Global Ministries
  - United Presbyterian Church, USA The Program Agency
  - United Presbyterian Church, USA, Concil on Women & the Church
  - United Synagogue of America
  - Women's League for Conservative Judaism
  - Young Women's Christian Assoc.

320 W. Church Street
River Falls, WI. 54022
August 30, 1982

Senator ~~Oren~~ Orrin Hatch
Doug Johnson NRLC
419 7th. St. N.W., Suite 402
Washington, D.C. 20004
C/O Inf. for Congressional Record

Dear Senator Hatch:

We have 6 children: 2 biological and 4 adopted. All of our adopted children were hard-to-place, special needs children.

Our first adopted chid is a girl who is 1/3 Indian. At the time we adopted her it was not the "in" thing or socially acceptable to adopt children with Indian blood. She is a lovable, warm, brilliant girl who is now married and has presented us with a wonderful grandson!

Our second adopted child is also a girl. For the first 18 months of her life she had high fevers of an unknown origin, coupled with hyperactivity caused by improper medication and food. Because of these problems she was considered hard-to-place. These medical problems are all in the past as they have not returned in the eleven years in which she has been a member of our family. She is an active, lovable, beautiful child who sold over $300 of Girl Scout cookies which took the whole family and friends to deliver.

The third adopted child is also a girl. She was born blind. Her blindness was not discovered by her doctors until she was 6 months old. At that time, when her biological mother learned of the blindness (the mother was unmarried and in foster care), kissed the baby good bye and left. This daughter is extremely bright and now at age 5½ she is typing braille, exerts herself in all things (she ice- and roller-skates, climbes ladders, hikes in the Tetons, and is learning to ride a two-wheel bicycle), and has many friends.

Our fourth adopted child is a boy, whom we adopted when he was 7 years old. For over 5 years he had been in-and-out of foster homes and lived for a brief time with his biological mother and biological grandparents. He is exceptionally bright and learned to read at age three.

None of our four adopted children were wanted by their biological parents. They had a right to live, a right to have their own family. Each of them in their individual and collective way with our biological children have greatly enriched our lives. We love them very much as they are our children just as if they had been born to us --- for they are children of God. We're grateful to live in Wisconsin where the adoption procedure and availability of children are so great!

We view abortion as being next to murder, yet consideration should be given to pregnancy caused by incest, rape, and their related effect on the psychological health of the mother. Abortion on demand is a sin! We know that a fetus has legal rights in a will.

After we have sent Christmas Cards telling about our new children, friends and relatives have asked us where we are getting these children. They want to adopt and have been told that there aren't any children availabe for adoption. We know that there would be homes for these children as they are are wanted and needed no matter what their physical or mental condition.

Hopefully we will be able to adopt one more child, even with the way the economy is at the present time.

One might wonder how our two biological children (2 boys) would interact or accept the adopted siblings. The boys have accepted them with love and caring as their brother and sisters. Prior to adding an adoptive child to the family, a family council was held to discuss the probability of adopting another child. The decision to adopt was always a unanimous decision of the family council. Since our married daughter was not part of the family council when we decided to adopt again (it is to be another boy), she told us she was not in favor of adopting another brother; rather, she wants another sister!

As we said earlier, all of the children individually and collectively have brought every member of the family joy and happiness. It is a priviledge to be a parent, to participate in the children's growth, development and nuturing.

Abortion is wrong. We are a nation under God. We reap what we sow.

Sincerely,

Earl & Meriel Monical

Earl & Meriel Monical

A
Population
Council
Fact Book

Induced Abortion

A World Review, 1981

Christopher Tietze

4th edition

A Population Council Fact Book
The Population Council, New York

The Population Council
One Dag Hammarskjold Plaza
New York, New York 10017

**Population Council Library
Cataloging in Publication Data**

Tietze, Christopher
Induced abortion: a world review, 1981

(A Population Council fact book)
Bibliography: p.
1. Abortion. 2. Abortion—Statistics. I. Title.
HQ767.T54 1981 301
ISBN 0-87834-043-2

Library of Congress Card No. 81-4986

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The Population Council, Inc.

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Printed in the United States
of America

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Preface

This fact book presents an overview of current international data on induced abortion, primarily from the public health, demographic, and policy points of view. It is not intended to address specific questions of medical technology. Statistical tabulations make up the major part of the book, with the text providing background information.

The present volume contains most of the information covered in its forerunners since 1973, updated to the autumn of 1980. Data may vary from those previously published because errors have been corrected and provisional data replaced by definitive ones, with rates and ratios being recalculated where appropriate.

Acknowledgments

The author wishes to thank the many colleagues, both here and abroad, who have contributed to the compilation of this report by making available published and unpublished statistics on abortion and in other ways, not all of whom can be mentioned here. Special thanks are due to Mohamed Ayad of the National Office of Family Planning and Population, Tunis; Chantal Blayo of the National Institute of Demographic Studies, Paris; Willard Cates, Jr. and his colleagues of the Centers for Disease Control, Atlanta; Henry P. David of the Transnational Family Research Institute, Bethesda, Md.; Susan K. Cole of the Scottish Health Service, Edinburgh; Sivakami Devi of the National Family Planning Center, Singapore; S. S. Fluss and Harald Hansluwka of the World Health Organization, Geneva; A. S. Härö of the National Board of Health, Helsinki; Gustav Grillmaier of the Federal Statistical Office, Wiesbaden; Philip Kestelman of the International Planned Parenthood Federation, Europe Region, London; Evert Ketting of Stimezo-Nederland, The Hague; Andras Klinger of the Central Statistical Office, Budapest; Lisbeth B. Knudsen of the National Health Service, Copenhagen; Celestino A. Lajonchere of the Institute for Health Development, Havana; Gerd S. Lettenstrom of the Central Bureau of Statistics, Oslo; Minoru Muramatsu of the Institute of Public Health, Tokyo; Jean Pakter of the Department of Health, New York City; C. R. Sinha of the Ministry of Health and Family Welfare, New Delhi; Jaromir Stach of the Institute for Health Statistics, Prague; Ulla Takman of the National Board of Health and Welfare, Stockholm; Surinder N. Wadhera of Statistics Canada, Ottawa; Halina Wior of the Institute for Mother and Child, Warsaw; and the staff of the Statistical Office of the United Nations, New York City.

Thanks are also due to my associates at the Center for Policy Studies, especially to Christine Bratton and Carolyn Williams, research secretaries, and to Robin Londeree, word processing coordinator, assisted by Laura VanBuskirk; and to my editor, Robert Heidel, and Renée Santhouse, production and design supervisor, for their unflagging assistance in the preparation of this report.

Introduction

The current trend toward liberalization of abortion laws in many countries has generated a proliferation of information concerning the incidence of induced abortion, the characteristics of women obtaining abortions, the methods used for the termination of pregnancy, and the morbidity and mortality associated with the procedure (e.g., *David, 1974, 1978a; Osofsky, 1973; Potts, 1977; Zatuchni, 1979*). As a preliminary to the statistics presented in this fact book on these and related subjects, this section reviews briefly the terminology that has been established in the field; the sources of data, including methods of estimation; and the measures of incidence employed in the report.

Definitions

As used by the medical profession, the term "abortion" denotes the termination of a pregnancy after the implantation of the blastocyst in the endometrium but before the fetus has attained viability, that is, before it has become capable of surviving, with appropriate life support, the neonatal period and eventually maintaining an independent extrauterine life. According to medical tradition, viability is attained after 28 weeks of gestation, counting from the first day of the last normal menstrual period, corresponding to a fetal weight of approximately 1,000 grams. This definition was based on the observation that infants below this weight had little chance of survival, whereas the mortality of infants above 1,000 grams declined rapidly with increasing weight.

Advances in the care of premature infants during recent years have led to a reevaluation of viability. A few infants born at less than 24 weeks of gestation have been reported to have survived, as have a few others weighing less than 600 grams at birth. However, no well-documented case of survival of any infant born at less than 24 weeks of gestation *and* weighing less than 600 grams was found by the United States National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (*Behrman, 1976*). Hence, both the duration of pregnancy and the weight of the infant, as well as its physical condition, must be considered if viability is to be presumed.

After expulsion or removal, a nonviable fetus may show such signs of life as heartbeat or respiration, in which case it is considered a "liveborn infant," even if it dies shortly thereafter, according to the definition adopted in 1950 by the Third World Health Assembly and subsequently by many countries.

The two major categories of abortions are the induced and the spontaneous. Induced abortions are those initiated voluntarily with the intention to terminate a pregnancy; all other abortions are called spontaneous, even if an external cause is involved, such as an injury or high fever. In this fact book, unless otherwise noted, the term "abortion" refers to induced abortion, including legal and illegal abortion as defined by the laws of each country. The terms "miscarriage," "therapeutic abortion," and "criminal abortion," sometimes used in lieu of spontaneous abortion, legal abortion, and illegal abortion, respectively, have been avoided.

As used in this book, the concept of induced abortion refers to measures taken when pregnancy is known or at least suspected to exist. Fertility regulating methods acting on the fertilized ovum prior to implantation, such as the postcoital pill and probably the IUD, are considered to be contraceptives and, hence, outside the scope of this book.

Where abortions are illegal they are frequently performed by unqualified persons under unsanitary conditions, resulting in increased risks of injury and infection. These higher risks also apply to self-induced abortions, regardless of their legal status. The differential diagnosis between spontaneous abortion on the one hand and illegal or self-induced abortion on the other is often impossible because the latter cannot be identified without evidence of manipulation, such as injury to the cervix or perforation of the uterus, or information from the woman, members of her family, or the abortionist. Most septic abortions are thought to be induced, but many illegally induced abortions show no signs or symptoms of infection, whereas some spontaneous abortions do.

Such diagnostic categories as imminent, inevitable, incomplete, and complete abortion describe stages in the process of abortion, spontaneous or induced, and are significant only in relation to a specific point in time. After an illegal abortion has been initiated (e.g., by the insertion of a catheter into the uterus), a woman may seek medical care at any stage, although a knowledgeable woman will wait until she feels sure that the process is irreversible. Incomplete abortion is the most common diagnosis when women are admitted to hospitals for aftercare, usually for postabortal bleeding caused by retention of placental tissue.

Sources of Data

Most of the tables in this fact book are based on official statistics of legal abortions from countries where liberalized abortion laws have been enacted at various times since the late 1930s. Most of these laws provide for the reporting to health authorities of all abortions performed under the provisions of the statute, and in most of the countries nationwide statistics are published periodically. The completeness and accuracy of the reporting and the quantity and quality of the tabulations vary widely among and within countries. Since 1971, the United Nations Statistical Office has compiled some of these statistics and published them in the *Demographic Yearbook*.

Reporting is probably most complete where a formal authorization procedure is prescribed by statute and all legal abortions must be performed in hospitals or other facilities subject to official licensure; it is likely to be least complete for abortions performed in the offices or surgeries of medical practitioners in private practice. In addition to underreporting, there may be faulty reporting of such personal characteristics as residence, age, and weeks of gestation, especially if legal or financial considerations are involved. Marital status may be misstated and prior induced abortions denied to avoid embarrassment.

Reported numbers of legal abortions may include two categories of cases that are not covered by the definition of abortion given in the preceding section.

Some abortion procedures may be performed on the basis of an erroneous diagnosis of pregnancy, the error being discovered during or after the procedure. In a large series of abortions performed in the United States during 1970/71,[1] about 0.3 percent of all women diagnosed as being in the first trimester of gestation proved to be not pregnant (*Tietze, 1972*). The probability of nonpregnancy increases to about one percent when the uterus is evacuated during the first two weeks following the expected onset of a missed menstrual period because pregnancy is suspected although not definitely diagnosed. The proportion of nonpregnant women is inversely related to the duration of amenorrhea (*Fortney, 1977*).

At the other extreme of the gestational period during which legal abortions are performed, a few pregnancies may be terminated on the assumption that the fetus is not yet viable but subsequently is found to weigh more than 600 or even 1,000 grams. Although most of these fetuses die during the abortional procedure and virtually all of the few infants born alive die within a few hours or days, these cases present major ethical and legal problems. It has been estimated that about 200 fetuses showing signs of life were born in the United States in 1974 after medical induction or hysterotomy. An estimated six or seven infants may have survived (*Bok, 1976*).

Reliable statistical data on illegal abortions do not exist. Although information on contraceptive practices has been successfully obtained in many countries by interviewing samples of women (usually married women), and occasionally of men, drawn from the general population, efforts to estimate the incidence of illegal abortion by such surveys have been far less successful. It is quite apparent that many respondents are willing to reveal their contraceptive practices to an interviewer but not to report experience with illegal or even legal abortion. The classic example is the Fertility and Family Planning Study of 1966, conducted in Hungary more than a decade after the legalization of abortion (*Hungary, 1969*). In that survey, the numbers of abortions reported by the respondents for the years 1960-65 corresponded to only 50-60 percent of the number actually performed, according to reports from hospitals. A comparable level of underreporting was also noted in 1977 (*Hungary, 1979b*, p. 31). Another example is the recent survey of providers of abortion services in Seoul, Korea (*Hong, 1979*), which generated an abortion rate three times higher than the rate estimated a few years earlier on the basis of interviews with married women (*Hong, 1976*). Owing to the general inadequacy of abortion data based on surveys of samples of the general population, such data, included in previous editions of this fact book, are no longer shown.

Many investigators have tried to estimate the incidence of abortion on the basis of interviews conducted in various medical settings: with obstetrical patients, with gynecological patients, or with women attending birth control clinics. Although rapport in these medical situations may be better, as a rule, than in door-to-door interviewing, the results may be severely distorted by a number of selective factors (*Tietze, 1953*). Hence, no data of this type are included in this fact book. Nor have any estimates of the incidence of illegal abortion been accepted that were derived by subtracting a fixed percentage of births, representing the estimated spontaneous abortions, from the total number of abortions ascertained in a survey.

Another, only partially explored, approach to the methodology of abortion research is the "randomized response technique" (RRT), which permits respondents to give information on highly sensitive subjects without revealing the facts to the interviewer (*Warner, 1965*). In its original form, the RRT involves the use of a box containing a number of small beads in two colors, for example, 35 red beads and 15 blue beads. The box has a large window, allowing a view of its contents, and a smaller window through which only a single bead can be seen. Two questions are provided: one sensitive and the other nonsensitive. For example, a red bead visible through the small window may mean "Have you had an abortion during the past 12 months?" whereas a blue bead means "Were you born in the month of March?" The respondent is asked to shake the box and to answer the question indicated by the color of the bead visible in the window with either "yes" or "no." The interviewer records the answer but does not know which question is being answered.

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[1] Throughout the text and tables, a slash between years (/) indicates that the period covered is from some point in the first year to the same point in the second year; a dash between years (-) indicates that the period covered is in full calendar years.

The percentage of women who had an abortion during the past year (P) can be estimated from the percentage of respondents answering "yes" (P') according to the following formula:

$$P = \frac{100P' - (100 - Q)P''}{Q}$$

P'' is the proportion of respondents born in March, which is known to be, say, 8.3 percent. Q is the percentage of red beads in the box, 70 in our illustrative example. Assuming 20 percent "yes" answers, the computation works out as follows:

$$P = \frac{(100 \times 20) - (30 \times 8.3)}{70}$$

$$= \frac{2{,}000 - 249}{70} = \frac{1{,}751}{70} = 25$$

Hence it is estimated that 25 percent of the women in the population from which the sample was drawn had experienced an abortion during the 12 months preceding the interview. One major shortcoming of the RRT is the fact that it requires much larger samples than direct questioning.

Numerous modifications of the RRT have been developed to adapt the method to a variety of situations, including the interviewing of illiterate respondents. Their usefulness under field conditions is still being investigated.

Estimates of abortion experience obtained by the RRT have been compared with responses elicited by direct questioning in Taiwan (*Chi, 1972*), Canada (*Krotki, 1977*), Turkey (*Tezcan, 1977*), and Ethiopia (*Chow, 1979*). In each of these studies, as shown below, the RRT estimate of the percentage of women who had experienced at least one abortion during their lives was substantially higher than the percentage of women who reported the experience under direct questioning (DQ).

	RRT	DQ
Taiwan	28.2	12.7
Canada	9.0	1.5
Turkey	33.1	13.9
Ethiopia	34.8	0.1

However, when the RRT was administered to a small group of Taiwanese women known to have had abortions, the estimated proportion with abortion experience was only 40 percent, suggesting a considerable amount of prevarication even with the RRT (*Chow, 1973*). Conversely, an attempt to use the RRT in the 1973 National Survey of Family Growth in the United States generated an estimate of 693,000 abortions obtained by currently married women during the 12 months preceding the interview, roughly from October 1972 through September 1973 (*Shimizu, 1978*). This estimate is more than three times as high as the number of legal abortions to married women, derived from the provider survey of the Alan Guttmacher Institute and the distribution by marital status reported by the Centers for Disease Control (*Forrest, 1979*). While certainly many illegal and, therefore, unreported abortions took place during 1972/73, it is also clear that the RRT, as a methodology for estimating the incidence of abortion, is still an imperfect instrument.

Because of the difficulties encountered by investigators trying to determine the incidence of illegal abortion by interviewing procedures, attempts have been made to estimate at least the minimum level of abortions required to maintain a low fertility rate, given reasonable assumptions as to natural fecundity, spontaneous fetal wastage, and the effectiveness of contraceptive practice. One such study considers it unlikely that any population has ever attained a low level of fertility, represented by a lifetime rate of less than 2,200 births per 1,000 women, without significant recourse to legal or illegal abortion (*Tietze, 1975*). A total abortion rate of 1,000, corresponding to an abortion ratio of 300 or more per 1,000 known pregnancies, is a plausible minimum estimate for low-fertility countries with moderately effective contraception. If highly effective contraception is practiced, the comparable plausible minimum is on the order of 200 abortions per 1,000 women during their childbearing period, corresponding to an abortion ratio of 80 per 1,000 known pregnancies.

Statistical Analysis

Two distinct approaches to assessing the incidence of abortion involve relating the number of abortions (1) to the number of women at risk of having them and (2) to the number of births or pregnancies. The types of information obtained by these two approaches are different but complementary. This fact book follows the convention that measures relating abortions to women (or to the total population) are referred to as rates, whereas measures relating abortions to births or pregnancies are called ratios. Since this convention is not universally accepted, the relevant denominator is identified whenever necessary. Specifically, the following abortion rates and ratios appear in this book.

1 Abortion rates per 1,000 total population, corresponding to crude birth rates (Table 2).

2 General abortion rates per 1,000 women of reproductive age, defined as 15-44 years, corresponding to general fertility rates (Table 2).

3 Age-specific abortion rates per 1,000 women in five-year age groups, corresponding to age-specific fertility rates (Table 5). Age-specific abortion rates for women under 20 years of age are computed per 1,000 women aged 15-19, and those for women 40 and over, per 1,000 women aged 40-44. Age-specific abortion rates have also been computed separately for younger and older teenagers in a few countries (Table 7).

4 Total abortion rates (TAR) per 1,000 women (Table 5), corresponding to total fertility rates. These rates are computed by adding the age-specific abortion rates for quinquennial age groups and multiplying the sum by five. When age-specific rates are not available, the TAR can be approximated by multiplying the abortion rate per 1,000 women aged 15-44 by 30. It cannot be emphasized too strongly that all TARs shown in this fact book are period measures, not cohort measures. Statistical data permitting the computation of a cohort TAR are not available for any country.

5 Abortion ratios per 1,000 live births (Table 2). In the computation of these and all other abortion ratios in this book, the number of births in the denominator is the number occurring during a 12-month period starting six months later than the period during which the abortions were performed. The purpose of this shift of six months is to have abortions and births represent the same cohort of conceptions[2] and is important during periods of rapid changes in the birth rate.

6 Abortion ratios per 1,000 known pregnancies, that is, live births plus legal abortions, ignoring pregnancies ending in stillbirth, spontaneous abortion, or illegal abortion (Table 2). An abortion ratio per 1,000 live births (R) can be converted into a ratio per 1,000 known pregnancies (R') by the formula: $R'=R/(1{,}000+R)$. Conversely, R' is converted into R by the formula: $R=R'/(1{,}000-R')$.

R	R'
100	91
200	167
500	333
1,000	500
2,000	667
4,000	800

The principal advantage of computing the abortion ratio per 1,000 live births is that the denominator is usually known or can be estimated within narrow limits. The major shortcoming is the occasional occurrence of extremely high values for certain subpopulations, such as older women. Abortion ratios per 1,000 known pregnancies can never exceed 1,000 and are therefore more easily understood. They can be seriously distorted by the omission of illegal abortions from the denominator.

7 Age-specific abortion ratios per 1,000 known pregnancies (Table 6). In the computation of these ratios, abortions were "de-aged" by three months, and births (six months later) by nine months in order to approximate distributions by age at conception. Age-specific abortion ratios for younger and older teenagers are shown in Table 7. The effect of the de-aging procedure is illustrated in Figure 1, using the United States as an example.

8 Abortion ratios per 1,000 known pregnancies by parity (Table 9) and by marital status (Table 11).

In the interpretation of all rates and ratios it should be remembered that both numerators and denominators may be subject to non-negligible errors. Among the women obtaining abortions, those with age or other characteristics unknown were distributed pro rata. The numbers of women, used as denominators for the computation of rates, and of births, used for the computation of ratios, are themselves estimates of variable accuracy.

In order to signal the approximate nature of the data, all absolute numbers of abortions have been rounded, usually to the nearest hundred. Percentages and most abortion rates (except TARs) are shown to one decimal and a few very low rates, to two decimals. All TARs and most abortion ratios are shown to the unit digit. In most cases, however, all digits beyond the first two may be safely ignored because they do not convey valid information. All percentages have been forced to add to 100.

It is important to make a sharp distinction between abortion rates and abortion ratios: Assume two countries, each with a population of one million women of reproductive age, one with 200,000 live births and 50,000 abortions, the other with

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[2] The term "conception" is used here and elsewhere in this book as a matter of semantic convenience, in lieu of either one of the more precise terms "fertilization" and "implantation," which describe events occurring about one week apart.

75,000 live births and 25,000 abortions. The abortion rates are 50 and 25, respectively, per 1,000 women; the abortion ratios, 200 and 250, respectively, per 1,000 known pregnancies. Hence, one of these two countries has the higher abortion rate and the other has the higher abortion ratio. The abortion ratio corresponding to a given abortion rate is higher when the birth rate is low than when the birth rate is high.

The different age patterns of abortion rates and ratios are illustrated in Figure 2, again using the United States as an example. Because the abortion rates in this figure are computed in terms of estimated age at conception, rather than at abortion, they differ slightly from those shown in Tables 5 and 7.

No attempt has been made in this fact book to present statistics designed to answer the often-asked question: What proportion of all women has experienced (or will experience) an induced abortion during their life time, a number equal to the total first abortion rate (TFAR). This proportion is sometimes referred to as the "prevalence" of abortion. As stated above, no country has data permitting the computation of a *cohort* TAR, let alone a TFAR, and even if such data were available they would be of limited interest because they would describe the experience of a cohort that had most of its pregnancies and abortions some time in the past. A computation of TFARs on the basis of current *period* data, which is possible for several countries (see Tables 5 and 12), could produce very misleading results because the rapid changes in the incidence of legal abortion in recent years may have resulted in age patterns quite different from the patterns ultimately experienced by the cohorts of women now in the early portion of the reproductive ages.

FIGURE 1 Legal abortion ratios per 1,000 known pregnancies, by age at termination and age at conception: United States, 1977

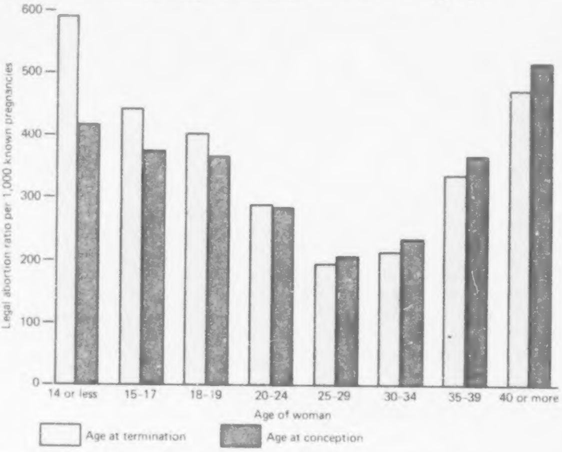
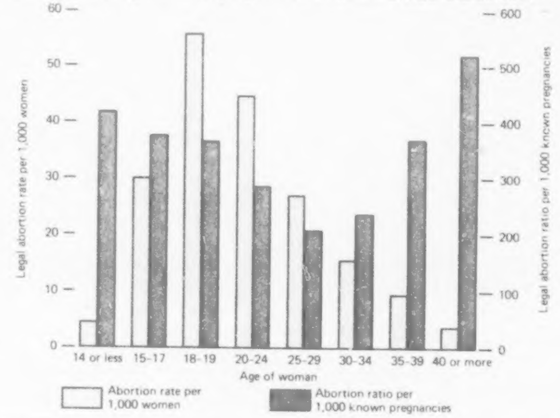


FIGURE 2 Legal abortion rates per 1,000 women and ratios per 1,000 known pregnancies, by age at conception: United States, 1977



Abortion Laws and Policies

Among the countries of the world, the legal status of induced abortion ranges from complete prohibition to elective abortion at the request of the pregnant woman (*United Nations, 1980*). Table 1 presents the most recent available information. The situation as of late 1980 can be summarized as follows. Nine percent of the world's 4.4 billion people lived in countries where abortion was prohibited without exception, and 19 percent lived in countries where it was permitted only to save the life of the pregnant woman. Most of the Muslim countries of Asia, almost two-thirds of the countries of Latin America, a majority of the countries of Africa, and five countries in Europe (Belgium, Ireland, Malta, Portugal, and Spain) fell into these two categories. Fewer than 10 percent lived under statutes authorizing abortion on broader medical grounds, that is, to avert a threat to the woman's health rather than to her life, and sometimes on eugenic, or fetal, indication (known genetic or other impairment of the fetus or increased risk of such impairment) and/or juridical indication (rape, incest, etc.) as well.

Twenty-four percent of the world's population resided in countries where social factors, such as inadequate income, substandard housing, unmarried status, and the like, could be taken into consideration in the evaluation of the threat to the woman's health (social-medical indication) or where adverse social conditions alone, without reference to health, could justify termination of pregnancy. Important countries in this group were the German Federal Republic, India, Japan, the United Kingdom, and most of the socialist states of eastern Europe.

Countries allowing abortion on request without specifying reasons—generally limited to the first trimester of pregnancy—accounted for 38 percent. Abortions on medical grounds are usually permitted beyond the gestational limit prescribed for abortions on social grounds or for elective abortions. Parental consent may be required if the pregnant woman is a minor. This category includes a very heterogeneous list of countries: Austria, the People's Republic of China, Cuba, Denmark, France, the German Democratic Republic, Italy, Norway, Singapore, Sweden, Tunisia, the United States, the USSR, Vietnam, and Yugoslavia. No information is available for the remaining less than one percent of the world's people; it would appear, however, that most of them lived in areas with restrictive abortion laws.

Several of the categories in the preceding paragraphs cover a wide range of situations. A statute authorizing abortion to avert a threat to the pregnant woman's health may define this threat narrowly or broadly, for example, by specifically mentioning mental health. Social indications also may be defined or interpreted narrowly, as in Romania or Uruguay, or broadly, as in Japan or Poland.

The abortion statutes of many countries are not strictly enforced, and occasional abortions on medical grounds are probably tolerated in most countries. It is well known that in some countries with restrictive laws abortions can be obtained openly and without the interference of the authorities from private physicians, as in Korea or Taiwan, or in nonprofit clinics, as in the Netherlands; they may even be performed in public hospitals, as in Cuba prior to their legalization in 1979. Conversely, legal authorization of abortion on request does not guarantee that the procedure is actually available to all women who may want their pregnancies terminated. Lack of medical personnel and facilities or conservative attitudes among physicians and hospital administrators may effectively curtail access to abortion, especially for economically or socially deprived women, as in parts of such countries as Austria, France, the German Federal Republic, India, Italy, and the United States.

Over the past 15 years, a large number of countries have liberalized their abortion laws to various degrees, notably Austria, Canada, Cuba, Denmark, Finland, France, the German Democratic Republic, the German Federal Republic, India, Italy, the Republic of Korea, Norway, Singapore, Sweden, Tunisia, the United Kingdom, and the United States. Four countries in eastern Europe adopted more restrictive legislation than previously in force: Bulgaria, Czechoslovakia, Hungary, and Romania. Three countries liberalized their abortion policies and later made them more restrictive: Iran, Israel, and New Zealand.

Major reasons advanced by advocates of less restrictive legislation in matters of abortion, and especially of abortion on request, have been considerations of public health (to combat illegal abortion with its associated morbidity and mortality), social justice (to give poor women access to abortion previously available only to the well-to-do), and women's rights (to secure a postulated right of all women to control their own bodies). A desire to curb population growth, in the interest of economic and social development, has been an explicit reason for the adoption of nonrestrictive abortion policies in only a few countries, such as Singapore and Tunisia and more recently in China. The majority of countries permitting abortion at the request of the pregnant woman or on broadly interpreted social indications have low birth rates, and some of them actively pursue pronatalist population policies.

Opposition to the liberalization of abortion laws has come traditionally from conservative groups, mainly on moral and religious grounds, with the Roman Catholic Church the most vigorous and articulate but by no means the only opponent. Concern about low birth rates has been a major reason for recent restrictive legislation in eastern Europe.

Because of its moral implications, abortion has become one of the most emotional and divisive political issues in a number of countries, including some where restrictive legislation is still in force and others where a liberal policy appeared to be firmly established a few years ago (*Jaffe, 1981*). The International Planned Parenthood Federation addressed the legal issues of abortion in a recent conference (*IPPF, 1979*).

The Americas

United States and Canada

In the United States, the tradition of the British Common Law that abortion was not a crime before the fetus quickened and that the aborted woman was immune from prosecution prevailed into the mid-nineteenth century. Massachusetts was the first state to deal with the subject by legislation, by including it in its revised criminal code in 1821, and the first state to enact, in 1845, a law dealing separately and exclusively with abortion. Of the 20 states with statutory provisions on abortion in 1860, 17 retained the common law immunity of women and about one-half incorporated the common law principle that abortion was a crime only after quickening. The other 13 states had no abortion statutes at that time.

After 1860, the medical profession began well-organized antiabortion campaigns. These campaigns, as well as public reaction to explicit and flamboyant advertisements by abortionists and apothecaries and to sensationally reported abortion cases in the courts, caused legislatures to review the subject and to enact restrictive laws, which remained in force with little change for the next 100 years. In most states, a threat to the life of the pregnant woman was the sole legal ground on which abortion could be performed; in a few states, a serious threat to the woman's health was included (*Mohr, 1978*).

A more liberal type of legislation was proposed by the American Law Institute in 1962. Following the example set by the countries of northern Europe, the relevant paragraph of the Institute's Model Penal Code would have permitted abortion if a licensed physician "believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect" or if the pregnancy resulted from rape, forcible or statutory, or incest (*American Law Institute, 1962*, pp. 189–191). Beginning with Colorado in 1967, about a dozen states adopted legislation based on the Model Penal Code.

In 1970, the legislatures of Alaska, Hawaii, and New York enacted laws that did not specify the indications on which a pregnancy could be terminated, thus in effect authorizing abortion on request. In the state of Washington, the same result was achieved by popular referendum. Concurrently with the activity in the legislatures, a number of test cases were initiated in several jurisdictions challenging the constitutionality of their restrictive abortion laws. As a result of a decision by the Supreme Court of the United States in one of these cases, elective abortion became available in the District of Columbia.

On 22 January 1973, two landmark decisions invalidating the abortion laws of most states were handed down by the Supreme Court (*United States, 1973*). In one of these cases, Roe v. Wade, the court ruled, 7 to 2, that during the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician," in consultation with the pregnant woman. After the first trimester, "the State . . . may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." After the fetus has reached viability[1] "the State . . . may, if it chooses . . . proscribe abortion except where necessary . . . for the preservation of the life or health of the mother." In the other case, Doe v. Bolton, the Supreme Court struck down a number of procedural provisions, such as the requirements that the termination of pregnancy be authorized by an abortion committee and that the woman seeking abortion must be a resident of the state in which the operation is to be performed. The Court also stressed that the attending physician's "medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of this patient." This statement echoes the World Health Organization's definition of health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity" (*WHO, 1970*, p. 30).

The reception of these decisions ranged from enthusiastic support by those committed to women's "right-to-choose" to emphatic rejection by an increasingly well-organized, well-financed, and vocal "right-to-life" movement. Under severe political pressure from the latter group, the legislatures of a number of states have taken a variety of actions to prevent, or at least to limit or delay, implementation. These actions were promptly challenged in the courts, and in 1976 the Supreme Court struck down state laws requiring spousal and parental consent (*AGI, 1976*). In 1977, however, the Court ruled that states are *not* required under the joint federal-state medical assistance (Medicaid) program to pay for abortions that are not "medically necessary" and that public hospitals are *not* obliged to provide abortion services (*AGI, 1977; Lincoln, 1977*). In addition, the "Hyde Amendment," which the Congress had attached to appropriation bills for the Department of Health, Education, and Welfare in 1976 and each subsequent year but which had been enjoined by a federal district judge, also became operative in late 1977. The lifting of the injunction resulted in the suspension of Medicaid payments for most abortions by the majority of states and in a reduction of funding by the federal government by more than 99 percent (*AGI, 1980a*). Federal funding remained available only when "the life of the mother would be endangered if the fetus were carried to term" and in some cases of rape or incest. The impact of the "Hyde Amendment" was mitigated by the fact that most of the larger states in which the majority of Medicaid abortions had been performed in 1977 continued to pay for these services from state funds either voluntarily or under court orders. Litigation on the issue of federal funding continued until 1980, when the Supreme Court decided, 5 to 4, that Congress had *not* acted unconstitutionally by imposing the "Hyde Amendment." The majority opinion held that the Constitution "affords protection against unwarranted government interference with freedom of choice" but "it does not confer an entitlement to such funds as may be necessary to realize all the advantage of that freedom." The Court also ruled that states need *not* pay for medical services for which no federal reimbursement was available (*AGI, 1980b*). The implementation of these decisions was delayed for several months by a petition for rehearing, which the Court denied, and by 1 January 1981 Medicaid funding for abortion had become unavailable in all but 15 states and the District of Columbia.

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[1] The use by the Supreme Court of the term "abortion" in reference to the artificial termination of pregnancy after the fetus has reached viability does not correspond to medical usage.

Efforts have also been made in the Congress of the United States and in many state legislatures to initiate a constitutional amendment that would nullify the 1973 landmark decisions by the Supreme Court. So far, these efforts have been unsuccessful.

The response of the traditional health services to the changes in the legal status of abortion that have occurred in the United States since 1967 and especially since 1973 has been inadequate. In late 1978, the most recent year for which this information is available, only 29 percent of all non-Catholic general hospitals and 18 percent of public hospitals provided *any* abortion services; if hospitals reporting fewer than two abortions per week are excluded, these percentages are reduced by more than one-half. In eight states *no* public hospital provided any abortion services, and in only three states did more than one-half of the public hospitals provide these services (*Henshaw, 1981*).

In Canada, a restrictive abortion law was liberalized in 1969. The new law permits termination of pregnancy only in hospitals and only if a committee of not fewer than three physicians, appointed by the hospital board, certifies by a majority of its members that the continuation of the pregnancy "would or would be likely to" endanger the life or health of the pregnant woman (*IDHL, 1970b*). However, only three out of ten public general hospitals in Canada had established abortion committees by 1978, and 15 percent of these hospitals reported no abortions during that year (*Canada, 1980*, pp. 54–55).

Latin America

Abortion laws in Latin America are generally restrictive. Among the 22 independent countries with more than one million inhabitants, three forbid abortion under all circumstances, 12 permit it only to avert a threat to the pregnant woman's life, while six countries recognize broader medical indications. Seven countries allow termination of pregnancy in cases of rape and/or incest. In Uruguay, where abortion had been legal from 1933 to 1938 (*Thevenet, 1978*, pp. 52–53), penalties may be waived if the abortion is performed during the first three months of pregnancy for reasons of serious economic stress.

In Cuba, elective abortions have been available in government hospitals since the mid-1960s; this policy was officially legalized in 1979 (*Hollerbach, 1980*). Puerto Rico is subject to the jurisdiction of the Supreme Court of the United States.

Western Europe

Apart from the USSR (see below), the first European country to move toward the liberalization of abortion statutes was Latvia, where a law permitting abortion during the first trimester on eugenic, juridical, and social indications was enacted in 1932. The social indication was defined very broadly ("to prevent the birth of a child which would cause severe stress for the pregnant woman or her family") and was abandoned in 1935 (*Denmark, 1936*, pp. 17 and 160).

Another early forerunner of modern abortion laws was a decree issued by the regional legislature of Catalonia in December 1936 (i.e., during the Spanish Civil War) authorizing termination of first-trimester pregnancies on medical, eugenic, and "ethical" grounds (*Spain, 1937*). The indications are not clearly defined in the decree, but its preamble suggests a broad interpretation, possibly encompassing social and economic reasons. It is not known to what extent, if any, the decree was implemented.

The Nordic Countries

The first definitive steps toward the liberalization of abortion laws were taken by three of the five Nordic countries: Iceland (1935), Sweden (1937), and Denmark (1938). After World War II, Sweden and Denmark further liberalized their laws, and new statutes were enacted in Finland and Norway. The range of acceptable grounds for abortion was roughly the same in each of these countries and included medical, eugenic, juridical, and social-medical indications. The more recent statutes extended the traditional eugenic indications, covering the hereditary transmission of mental disease, mental retardation, and other severe maladies and defects, to include any damage acquired during intrauterine life, such as the effects of maternal rubella, irradiation, or thalidomide ingestion during the early weeks of pregnancy. A Danish law of 1970 authorized termination of pregnancy on request during the first 12 weeks of pregnancy for all women over age 38 domiciled in Denmark and for those with four or more living children (*IDHL, 1970a*). A similar statute, with age 40 as a cutoff point for elective abortion, was also enacted in Finland (*IDHL, 1970c, 1979a*).

The most recent Danish statute, which took effect on 1 October 1973, authorizes abortion on request during the first trimester for all women. At later stages of pregnancy, abortion may be performed on any of the grounds listed in the 1970 statute (*IDHL, 1973c*). A new Swedish law, implemented on 1 January 1975, goes even further by specifically recognizing the woman's right, in the absence of medical contraindications, to have her pregnancy terminated up to the end of the eighteenth week of gestation. Beyond that point, abortion can be approved in exceptional cases by the National Board of Health and Welfare (*IDHL, 1974g*). Iceland (*IDHL, 1977c*) and Norway (*IDHL, 1976b*) also liberalized their abortion laws in 1975, stopping just short of authorizing abortion at the request of the pregnant woman on the Danish and Swedish model. Three years later, however, Norway legalized abortion on request during the first 12 weeks of gestation. The new law took effect on 1 January 1979 (*IDHL, 1979b, 1980*).

United Kingdom

One of the more recent additions to the roster of European countries with extended indications for legal abortion is the United Kingdom. According to the Common Law, which is the basis of the British legal system, abortion was not an indictable offense from 1327 to 1803 (*Means, 1971*), when abortion became a felony, but was less severely punished prior to quickening than thereafter. The Offenses Against the Person Act of 1861 made "unlawfully" induced abortion a felony regardless of the duration of the pregnancy. The Act did not define "unlawfully" and made no provision for the termination of pregnancy on medical grounds. However, in 1938, in Rex v. Bourne, the judge ruled that abortion need not be unlawful if performed in good faith to preserve the mother's life. The jury was further instructed that: "If the doctor is of the opinion . . . that the probable consequences . . . will be to make the woman a physical and mental wreck, the jury is quite entitled to take the view that the doctor . . . is operating for the purpose of preserving the life of the mother" (*Potts, 1977*, p. 289). Bourne, who had performed an abortion on a young woman who had been raped by several men, was acquitted and a legal precedent was set.

Almost 30 years later, in October 1967, after a long and bitter legislative struggle, Parliament enacted a liberalized abortion statute authorizing abortions if two physicians "are of the opinion, formed in good faith— (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; (b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped" (*IDHL, 1967b*, p. 887).

The Act provides further that in determining whether there is such risk of injury to health, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." Abortions may be performed in National Health Service (NHS) hospitals or in facilities approved by the Minister of Health. The latter category includes mainly private nursing homes. The Act, which came into force on 27 April 1968, applies to England, Wales, and Scotland, but not to Northern Ireland.

The British Abortion Act of 1967 contains a number of major innovations. Potentially most important are the seven words "greater than if the pregnancy were terminated," qualifying the "risk to life or injury to physical or mental health" if the pregnancy were continued. Although this clause was inserted at a late stage in the legislative process at the request of the opponents of liberalization, it has been interpreted as justifying abortion on relatively minor medical indications, since the risk to life, in early pregnancy at least, is substantially less than the risk normally associated with pregnancy and childbirth. Another important idea is contained in the words "or any existing children of her family." Couched in medical terms, this phrase constitutes a recognition of the fact that not only the mother, but also her entire family, may be adversely affected by the birth of an unwanted child. In addition, the Act does not establish administrative machinery to authorize the termination of pregnancy. The woman's request can be approved by any two physicians in whose judgment the required conditions are met.

Because of numerous complaints about uneven implementation in various parts of Great Britain as well as about other alleged abuses, the operation of the Abortion Act was reviewed by a committee, chaired by the Hon. Mrs. Justice Lane. Appointed in 1971, the committee was "concerned with the way the Act is working and not with the principles that underlie it." Its report, issued in 1974 in three parts, contains a number of recommendations, mainly in regard to administration, the most important of which was to urge greater utilization of outpatient procedures (*United Kingdom, 1974a,* vol. 1, pp. 147–150). Over the past several years, repeated attempts have been made in Parliament to restrict the Abortion Act of 1967 in various ways. So far, these efforts have been unsuccessful.

Other Countries in Western Europe

All countries in western Europe, with the exception of the Nordic countries and Great Britain, had restrictive abortion laws until 1 January 1975, when an Austrian law, passed in the preceding year, came into force, permitting elective abortion during the first trimester (*IDHL, 1975a*). A few days later France authorized, for a period of five years, abortion on request during the first ten weeks of pregnancy, subject to a number of provisions, including the following: (1) after applying for an abortion, the pregnant woman must receive counseling at an approved social service agency; (2) after this consultation, a waiting period of one week must be observed; and (3) the number of elective abortions in any institution must not exceed one-fourth of all obstetrical and surgical procedures (*IDHL, 1975b*). The statute was made permanent, with minor changes, in late 1979.

The German Federal Republic also passed a new abortion law in 1974, authorizing abortion on request during the first trimester (*IDHL, 1974h*). This law, however, was struck down by the Constitutional Court. Following guidelines set by the Court, revised legislation was adopted by the Federal Legislature in May 1976. The new law permits abortion if, "according to medical findings, a pregnancy termination is indicated, taking account of the present and future living conditions of the pregnant woman, in order to avert a risk to the life or a risk of serious damage to the physical or mental state of health of the pregnant woman, and such risk cannot be averted by any other means that the woman can be expected to accept." Abortion may also be performed until 22 weeks "from conception" if, according to medical opinion, "imperative grounds exist for presuming that, as a consequence of a hereditary predisposition or harmful influences prior to birth, the child would suffer from irremediable injury to its state of health of such gravity that the pregnant woman cannot be required to continue the pregnancy to term"; until 12 weeks from conception in cases of rape and other forms of sexual abuse, and if "a pregnancy termination is otherwise indicated in order to prevent the pregnant woman from being exposed to the risk of serious consequences which: (a) are of such gravity that the pregnant woman cannot be expected to continue the pregnancy to term; and (b) cannot be averted by any other means that the woman can be expected to accept" (*IDHL, 1976a*, p. 563). It is clear that this last provision gives considerable latitude to the physician. The use of the words "from conception" implies upper gestational limits of 24 or 14 weeks from the woman's last menstrual period, depending on which indication is applicable.

For all abortions other than those performed to avert a risk to life or health "deriving from a somatic disease or physical injury," the German law requires that the woman be counseled concerning "public and private assistance available to pregnant women, mothers, and children" and that she wait three days after such counseling before the abortion is performed. The physician authorizing the abortion is not allowed to carry out the procedure. An interesting feature of the law is a provision exempting any "procedures that take effect before nidation of the fertilized ovum in the uterus has occurred."

In May 1978, Italy liberalized its abortion law. Women over age 18 may obtain an abortion in the first trimester for medical, economic, social, family, or psychological reasons, or if there is a risk of defect in the fetus, provided they seek consultation. The woman has the right to obtain an abortion after a seven-day waiting period. Abortions after the first trimester are permitted if continued pregnancy endangers the health of the woman or if there are grounds for believing the fetus is defective. Abortions for women under 18 years of age require parental consent (*IDHL, 1978a*).

Strong opposition to the new abortion laws has been expressed by many members of the medical profession in Austria, France, the Federal Republic, and Italy; the availability of abortion services remains uneven in all four countries.

In the Netherlands, a bill authorizing abortion on request of the pregnant woman was passed in the lower house of the national legislative body in 1976 but was defeated in the upper chamber. This left the Netherlands with a restrictive law and liberal practice (20 mostly nonprofit clinics openly performing almost 55,000 abortions in 1979, with about 75 percent being obtained by nonresidents). In Switzerland, similar propositions were rejected by two popular referenda. The current law permitting abortion on medical grounds is narrowly interpreted in some cantons and very liberally in others, notably in Geneva. Malta, Portugal, and Spain remain the only countries in the region prohibiting abortion under all circumstances.

Eastern Europe, Including the USSR

In the socialist countries of eastern Europe, abortion policies have undergone several major changes since 1920, when the USSR became the first country to legalize abortion on request (*David, 1970*). This nonrestrictive policy was reversed in 1936 by limiting legal abortion to a list of specified medical and eugenic indications, but was reinstituted in 1955, when the decree of 1936 was repealed. In the words of the preamble to the 1955 Soviet decree, its aims were "the limitation of harm caused to the health of women by abortions carried out outside of hospitals" and to give "women the possibility of deciding themselves the question of motherhood" (*Field, 1956*).

Following the example of the USSR, the socialist countries of eastern Europe, with the exception of Albania and the German Democratic Republic, liberalized their abortion laws in 1956–57. The new statutes permitted abortion on request or on broadly interpreted social indications during the first trimester (in Hungary up to 18 weeks in the case of minors). Otherwise, abortions in the second trimester were permitted on medical indications only. In several countries, abortion was not allowed if the pregnant woman had obtained an induced abortion within the previous six months.

In recent years, some of the countries of eastern Europe have enacted more restrictive laws, doubtless in response to concern about low birth rates. The change was most drastic in Romania, where a statute permitting elective abortions enacted in 1957 was reversed in October 1966 by a decree restricting abortion to women over age 45 (lowered to age 40 in 1972) and to women supporting four or more living children, in addition to the usual medical, eugenic, and juridical indications (*IDHL, 1967a, 1974e*).

In Bulgaria, abortion on request was available from 1956 to 1968. Instructions by the Ministry of Public Health in February 1968 and again in April 1973 (modified in 1974) have limited access to elective abortions to married women with two or more living children, unmarried women without regard to age, and married women over 40 with one living child. In addition, the maximum duration of pregnancy at which abortion may be performed was reduced from 12 to 10 weeks (*IDHL, 1968, 1973b, 1974f*).

In Czechoslovakia, applications for abortion have been adjudicated by commissions since the enactment of the liberalized law in 1957 (*IDHL, 1959*). Although some of the provisions of that law were tightened in 1961 (*IDHL, 1962*), virtually all abortions on medical indication and most of those requested for other reasons continued to be approved. A new directive, issued in 1973, restricted to exceptional cases the approval of applications for abortion on social grounds made by married women without living children or with only one living child. Abortion on medical indication is now regulated by a list of approved diagnoses that limit consideration of mental health to severe disorders, such as reactive depression with suicidal tendencies confirmed by hospitalization; the previous list referred to possible suicidal tendencies without mention of hospitalization (*IDHL, 1974a*).

In Hungary, too, abortion committees had been maintained throughout the period of abortion on request (1956–73), but their function was purely advisory since applications had to be approved if the woman persisted (*IDHL, 1958*). Since 1 January 1974, access to abortion has been significantly restricted. Termination of pregnancy on request is still available to single, divorced, separated, and widowed women; to married women over age 40 (until 31 December 1978 the age limit was 35); and to married women who have at least three living children, or have experienced three deliveries, or have two living children and have, in addition, undergone at least one "obstetrical event." This term includes live births, stillbirths, ectopic pregnancies, spontaneous abortions, and induced abortions. The last may be taken into account only if they occurred after the woman's second delivery. Women who do not meet these requirements may obtain abortions on medical, eugenic, and juridical grounds; the only social indication that makes approval mandatory is lack of adequate housing, defined as a separate dwelling unit (*IDHL, 1974d*).

The German Democratic Republic did not participate in the general liberalization of abortion laws during the 1950s. After World War II, the harsh restrictions of the Third Reich were replaced by state laws under which legal abortions could be performed on medical, eugenic, and juridical indications and, to some extent, on social and economic grounds. These statutes were superseded in 1950 by a new law that permitted abortion on medical and eugenic indications only. In 1965 an extension of the medical indication was administratively authorized, taking into account the woman's social environment, and in 1972 legislation was enacted permitting abortion on request during the first trimester (*IDHL, 1972b*).

Yugoslavia is the only country in eastern Europe in which a woman's right to "free decision on childbirth" is anchored in its Federal Constitution, adopted in 1974. This provision has been implemented by the several republics and autonomous provinces. Abortion must be performed at the request of the pregnant woman, without committee approval, if the duration of pregnancy is under ten weeks. The decision on abortion after ten weeks is left to committees, consisting of physicians and social workers, on the basis of medical, eugenic, judicial, and social indications (*IDHL, 1977d, 1979c*).

Asia, Africa, and Oceania

China

In the People's Republic of China, abortion on the request of the pregnant woman was *de facto* legalized in 1957 by a directive from the Ministry of Health to the effect that henceforth requests for abortion "must be granted without restrictions in regard to the age of the applicant or the number of her children and without the requirement of special approval procedures." However, elective abortion was limited to the first ten weeks of gestation and could not be performed on the same woman more than once a year (*Aird, 1972*, p. 263). The directive had been preceded by discussion in the press and in Communist Party committees over several months and was apparently issued over strong opposition by the medical profession, which did not subside until 1963 (*ibid.*, p. 299). Since 1972 abortion has been reported to be freely available, usually performed during the first 12 weeks of pregnancy by nurses and, at least in some rural communes, by trained "barefoot doctors" or midwives (*Faundes, 1972*). A new criminal code, enacted in 1979, contains no reference to abortion.

In Taiwan, abortion is categorically prohibited, but apparently readily available from medical practitioners throughout the island.

Japan

In Japan, Article 14 of the Eugenic Protection Law of 1948 permits termination of pregnancy for a woman "whose health may be affected seriously by continuation of pregnancy or by delivery from the physical or economic viewpoint" (*Muramatsu, 1967*, p. 68). The interpretation of this paragraph by the medical profession and by the authorities has been tantamount to making abortion available on request. In late 1972 and again in 1974, proposals were advanced in the legislature to remove the economic element from the indications for abortion, replacing it by considerations of mental health. According to these proposals, termination of pregnancy would be permitted when the pregnant woman's physical or mental health was thought to be seriously threatened by the continuation of pregnancy or by delivery (*Muramatsu, 1974*). So far, no action has been taken. In 1976, however, the upper limit of the gestational period during which abortion may be performed was reduced from 28 to 24 weeks.

Korea

Prior to 1973 legal abortion in the Republic of Korea was limited by law and judicial decisions to narrow medical indications. The law, however, was not enforced and abortion could easily be obtained from gynecologists who performed the procedure in their private clinics. Large segments of the public were unaware of the legal status of abortion; for example, in a survey taken in 1971, two-thirds of the respondents did not know that abortion was, in general, illegal (*Hong, 1976*, pp. 105–109). In 1973 legislation was adopted authorizing termination of pregnancy on medical, eugenic, and juridical indications (*IDHL, 1973d*). The wording of the new law was far more restrictive than actual practice had been during recent years. The law remains a dead letter, however, and the government subsidizes abortions in the private sector if they are combined with surgical sterilization or if the pregnancy resulted from IUD failure.

Other Countries of East and Southeast Asia

In Hong Kong, abortion on medical indication, as defined in the British

Abortion Act of 1967, was authorized in 1972 (*IDHL, 1974c*) for a period of two years. The ordinance was extended for two additional years in 1974 and made permanent in 1976 (*Cook, 1979*). However, the clauses of the British Act concerning the health of existing children and the risk of physical or mental abnormalities in the child to be born do not apply in Hong Kong.

Abortion on request has been available in North Vietnam at least since 1971 and in the entire country since its unification in 1975. Previously, only narrowly interpreted medical indications were acceptable in South Vietnam.

Singapore liberalized its abortion law in 1969, permitting termination of pregnancy on medical and social grounds (*IDHL, 1970d*). Abortion on request was legalized for all residents in 1974 and is permitted up to 24 weeks of gestation. Abortions must be performed in hospitals, and certain restrictions as to the qualifications of the physician apply after 16 weeks (*IDHL, 1975c*).

South-Central Asia

In India, legalization of abortion has been a matter of governmental concern for more than a decade. In 1971 an abortion statute patterned after the British Abortion Act of 1967 was adopted, with the important additions that a pregnancy alleged by the woman to be caused by rape and, in the case of a married woman, a pregnancy resulting from contraceptive failure "may be presumed to constitute a grave injury to the mental health of the woman" (*IDHL, 1971*).

In Bangladesh, Pakistan, and Sri Lanka, restrictive legislation remains in effect. Nevertheless, ambulatory "menstrual regulation" services have become available, on a limited scale, in Bangladesh. At the request of the government the Pathfinder Fund has instituted a national program to train 600 physicians and 800 family welfare visitors (*Rahman, 1980*). In at least some government-supported clinics, paramedical workers already perform MR procedures defined as evacuation of the pregnant uterus up to nine weeks from the onset of the last menstrual period (*Bhatia, 1980*). According to the Second Five Year Plan, released in 1980, "menstrual regulation facilities will be provided through the family planning clinics, welfare centers, all health centers and hospitals, etc." (*Bangladesh, 1980*, para. 17.87).

Southwest Asia and Northern Africa

In most of the countries of southwest Asia and northern Africa, abortion is illegal or restricted to the termination of pregnancies on medical indication (*Nazer, 1972*). A major exception is Tunisia, where abortion on request has been available since 1965 to women with five or more living children (*IDHL, 1966*). In September 1973, elective abortion was authorized for all women during the first trimester of pregnancy if performed by a physician in a hospital or clinic. After the third month, termination of pregnancy is permitted on medical (including psychiatric) and eugenic indications (*IDHL, 1974b*).

In Israel, the British Offenses Against the Person Act of 1861 remained in force until 1977; however, in 1952 the District Court of Haifa ruled that abortion openly performed on bona fide medical grounds was permissible. In practice, the law was not enforced and abortions were freely obtainable from medical practitioners (*Slater, 1978*). In 1977 a modest liberalization was legislated permitting abortion to avert "grave harm to the woman or her children owing to difficult family or social circumstances" (*IDHL, 1977a*). The social indication was rescinded in 1979.

In Iran, Parliament had in 1974 enacted revisions to the penal code authorizing, in effect, first-trimester abortion at the request of "the couple" or of an unmarried woman. Regulations implementing the revised code were not issued until October 1976 (*IDHL, 1976c*), providing, *inter alia*, for the performance of abortions in nonhospital clinics; it is not known to what extent, if any, this provision was implemented. No reports on the legal status of abortion in postrevolutionary Iran have been located, but it can be fairly assumed that most abortions are now illegal under Islamic law.

Africa South of the Sahara

In Africa south of the Sahara, the codes introduced during the period of European colonial rule are still in force in all of the newly independent countries with the exception of Zambia, where a law virtually identical with the British Abortion Act of 1967 was passed in 1972 (*IDHL, 1973a*). The Republic of South Africa permits abortion on medical, eugenic, and juridical indications.

Oceania

In Australia, the regulation of abortion falls within the jurisdiction of the several states. One of these, South Australia, liberalized its abortion law in 1969, following the pattern of the British Abortion Act of 1967, but omitting the clause concerning the health of existing children (*IDHL, 1972a*) and prescribing performance of the abortion in a hospital. A similar statute was enacted in the Northern Territory in 1974 (*IDHL, 1977b*). Abortion on social-medical grounds has been legalized by court decisions in New South Wales and Victoria (*Cook, 1979*). As a result of these rulings and because there is no statutory requirement of hospitalization, abortion has become more accessible in these states than in South Australia. Nonprofit clinics have been established in several cities. The National Health Insurance Plan refunds about 80 percent of the fees charged by these clinics (*Australia, 1977*, p. 174).

Some liberalization of abortion statutes was achieved in Fiji and New Zealand in 1976 by judicial decision (*Cook, 1979*). In the following year, however, New Zealand enacted legislation narrowing the indications for abortion and establishing cumbersome procedural requirements (*IDHL, 1978b*). The restrictions imposed by this statute were slightly relaxed in 1978.

TABLE 1 Legal status of abortion by country and by grounds: Mid-1980

		LEGAL ON SPECIFIED GROUNDS[2]					
		Medical					
Country	ILLEGAL[1]	Narrow (life)	Broad (health)	Eugenic (fetal)	Juridical (rape, incest, etc.)	Social and social-medical	LEGAL (GROUNDS NOT SPECIFIED)
Afghanistan	—	X	—	—	—	—	—
Albania	—	—	X	—	—	—	—
Algeria	—	—	X	—	—	—	—
Argentina	—	—	X	—	X	—	—
Australia	—	—	X	X[3]	—	X[4,5]	—
Austria	—	—	—	—	—	—	X[6,7]
Bangladesh	—	X	—	—	—	—	—
Belgium	—	X	—	—	—	—	—
Benin	—	X	—	—	—	—	—
Bolivia	—	—	X	—	X	—	—
Brazil	—	X	—	—	X	—	—
Bulgaria[8]	—	—	X	X	X	X[9]	—
Burma	—	X	—	—	—	—	—
Burundi	X	—	—	—	—	—	—
Cameroon	—	—	X	—	X	—	—
Canada	—	—	X	—	—	—	—
Central African Republic	X	—	—	—	—	—	—
Chad	—	X	—	—	—	—	—
Chile	—	X	—	—	—	—	—
China, People's Republic of	—	—	—	—	—	—	X[10]
Colombia	—	X	—	—	—	—	—
Congo	—	—	X	—	—	—	—
Costa Rica	—	—	X	—	—	—	—
Cuba	—	—	—	—	—	—	X[9]
Czechoslovakia	—	—	X	X	X	X[6]	—
Denmark	—	—	—	—	—	—	X[6]
Dominican Republic	X	—	—	—	—	—	—
Ecuador	—	X	—	—	X	—	—
Egypt	X	—	—	X	—	—	—
El Salvador	—	X	—	X	X	—	—
Ethiopia	—	—	X	—	—	—	—
Finland[11]	—	—	X	X	X	X[6]	—
France	—	—	—	—	—	—	X[9]
German Democratic Republic	—	—	—	—	—	—	X[6]
German Federal Republic	—	—	X	X	X	X[6,7]	—
Ghana	—	—	X	—	—	—	—
Greece	—	—	X	X	X	—	—
Guatemala	—	X	—	—	—	—	—
Guinea	—	—	X	—	—	—	—
Haiti	X	—	—	—	—	—	—
Honduras	—	—	X	—	—	—	—
Hong Kong	—	—	X	—	—	—	—
Hungary[12]	—	—	X	X	X	X[6]	—
Iceland	—	—	X	X	X	X[6]	—
India	—	—	X	X	X	X[13]	—

TABLE 1 (continued)

Country	ILLEGAL[1]	LEGAL ON SPECIFIED GROUNDS[2]					LEGAL (GROUNDS NOT SPECIFIED)
		Medical					
		Narrow (life)	Broad (health)	Eugenic (fetal)	Juridical (rape, incest, etc.)	Social and social-medical	
Indonesia	X	—	—	—	—	—	—
Iran	—	X	—	—	—	—	—
Iraq	—	X	—	—	—	—	—
Ireland, Northern	—	X	—	—	—	—	—
Ireland, Republic of	—	X	—	—	—	—	—
Israel	—	—	X	X	X	—	—
Italy	—	—	—	—	—	—	X[6]
Ivory Coast	—	X	—	—	—	—	—
Jamaica	—	—	X	—	—	—	—
Japan[14]	—	—	X	X	X	X[15]	—
Jordan	—	—	X	—	X	—	—
Kenya	—	—	X	—	—	—	—
Korea, Democratic Republic of[16]	—	X	X	X	X	X	—
Korea, Republic of	—	—	X	X	X	—	—
Kuwait	—	X	—	—	—	—	—
Laos	—	X	—	—	—	—	—
Lebanon	—	X	—	—	—	—	—
Lesotho	—	X	—	—	—	—	—
Liberia	—	—	X	X	X	—	—
Libya	—	X	—	—	—	—	—
Luxembourg	—	—	X	X	X	X[6]	—
Madagascar	—	X	—	—	—	—	—
Malawi	—	X	—	—	—	—	—
Malaysia	—	X	—	X	X	—	—
Mali	X	—	—	—	—	—	—
Malta	X	—	—	—	—	—	—
Mauritania	X	—	—	—	—	—	—
Mexico	—	X	—	—	X	—	—
Mongolia	X	—	—	—	—	—	—
Morocco	—	—	X	—	—	—	—
Mozambique	—	X	—	—	—	—	—
Namibia	—	—	X	X	X	—	—
Nepal	—	—	X	—	—	—	—
Netherlands[17]	—	—	X	—	—	—	—
New Zealand	—	—	X	X	X	—	—
Nicaragua	—	X	—	—	—	—	—
Niger	X	—	—	—	—	—	—
Nigeria	—	X	—	—	—	—	—
Norway	—	—	—	—	—	—	X[6]
Pakistan	—	X	—	—	—	—	—
Panama	X	—	—	—	—	—	—
Papua New Guinea	—	—	X	—	—	—	—
Paraguay	—	X	—	—	—	—	—
Peru	—	X	—	—	—	—	—
Philippines	X	—	—	—	—	—	—
Poland[14]	—	—	X	—	X	X[6]	—
Portugal	X	—	—	—	—	—	—
Puerto Rico	—	—	—	—	—	—	X[6]
Romania	—	—	X	X	X	X[6, 18]	—
Rwanda	X	—	—	—	—	—	—
Saudi Arabia	—	X	—	—	—	—	—
Senegal	—	X	—	—	—	—	—
Sierra Leone	—	—	X	—	—	—	—
Singapore	—	—	—	—	—	—	X[19]
Somalia	X	—	—	—	—	—	—
South Africa	—	—	X	X	X	—	—
Spain	X	—	—	—	—	—	—
Sri Lanka	—	X	—	—	—	—	—
Sudan	—	X	—	—	—	—	—
Sweden	—	—	—	—	—	—	X[19]
Switzerland	—	—	X	—	—	—	—
Syria	—	X	—	—	—	—	—
Taiwan	X	—	—	—	—	—	—
Tanzania	—	—	X	—	—	—	—
Thailand	—	—	X	—	X	—	—

TABLE 1 (continued)

Country	ILLEGAL[1]	LEGAL ON SPECIFIED GROUNDS[2]					LEGAL (GROUNDS NOT SPECIFIED)
		Medical					
		Narrow (life)	Broad (health)	Eugenic (fetal)	Juridical (rape, incest, etc.)	Social and social-medical	
Togo	—	X	—	—	—	—	—
Trinidad & Tobago	—	—	X	—	—	—	—
Tunisia	—	—	—	—	—	—	X[6]
Turkey	—	X	—	X	X	—	—
Uganda	—	—	X	—	—	—	—
United Kingdom[20]	—	—	X	X	—	X[5]	—
United States	—	—	—	—	—	—	X[5]
Upper Volta	X	—	—	—	—	—	—
Uruguay	—	X	—	—	X	X[21]	—
USSR	—	—	—	—	—	—	X[6]
Venezuela	—	X	—	—	—	—	—
Vietnam	—	—	—	—	—	—	X[22]
Yemen, Democratic	—	X	—	—	—	—	—
Yugoslavia	—	—	—	—	—	—	X[6]
Zaire	X	—	—	—	—	—	—
Zambia	—	—	X	X	—	X[5]	—
Zimbabwe	—	—	X	X	X	—	—

NOTE: Table does not include most countries with fewer than one million inhabitants and those for which information on legal status of abortion was not located. Countries operating under Islamic law appear under "Medical/narrow (life)."

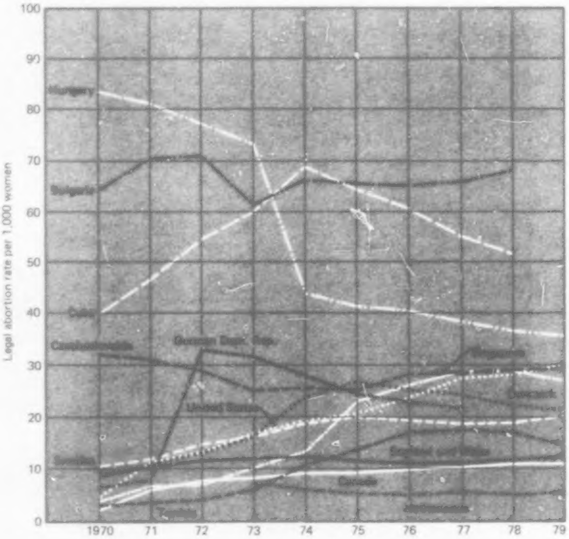
1. Abortion to save woman's life may be authorized under general principles of criminal law (state of necessity).
2. Abortion on medical and eugenic grounds is generally permitted prior to viability of fetus. Abortion on juridical grounds is generally permitted up to the same gestational period as abortion on social or social-medical grounds.
3. In Northern Territory and South Australia.
4. In South Australia.
5. Prior to viability of fetus, usually interpreted as 28 weeks.
6. During first three months or 12 weeks.
7. From implantation.
8. On request for unmarried women, married women with two living children, and married women over 40 with one living child.
9. During first ten weeks.
10. No legal limit but most abortions performed during first trimester.
11. On request for women over age 40.
12. On request for unmarried women, for married women with three living children or those who have experienced three deliveries, for certain categories of women with two living children, for married women over age 40, and for women without a home or apartment of their own.
13. During first 20 weeks.
14. No formal authorization required and abortion permitted in doctor's office; abortion de facto available on request.
15. During first 24 weeks.
16. For "important reasons."
17. Abortion on request openly available in nonprofit clinics.
18. On request for women over age 40 and for those with four or more living children.
19. During first 18 weeks.
20. The Abortion Act of 1967 does not apply to Northern Ireland.
21. Penalty may be waived when abortion performed during first three months of pregnancy because of serious economic difficulty.
22. Gestational limit not ascertained.

Incidence of Abortion

The number of pregnancies terminated each year by induced abortion throughout the world is not known. Recent estimates have ranged up to 55 million (*IPPF, 1974*), corresponding to an abortion rate of around 70 per 1,000 women of reproductive age and an abortion ratio of 300 per 1,000 known pregnancies, that is, live births plus abortions. Such global aggregates are highly speculative since they are based on country estimates that are, in many instances, of questionable validity. Legal abortions reported in countries with statistics that are believed to be reasonably complete, shown in Table 2, totaled about 2 million according to the latest data, generally for 1978-79. However, this excludes the three countries with presumably the largest numbers of legal abortions: China, the USSR, and Japan. No reliable method has yet been developed to estimate the numbers of illegal abortions.

Most of the statistics in Table 2 are based on official reports showing the numbers of abortions performed according to the laws of the countries concerned. In some cases the information for the most recent periods is preliminary and subject to later, presumably minor, revision. Figures 3, 4, and 5 illustrate trends in the incidence of legal abortions in selected countries during the 1970s. Figure 3, drawn on a linear scale, emphasizes the level of the abortion rates; Figure 4, by using a semilog scale, focuses on the changes in rates from year to year; Figure 5 shows abortion ratios per 1,000 known pregnancies.

FIGURE 3 Legal abortion rates per 1,000 women aged 15-44: Selected countries, 1970-79 (Linear scale)



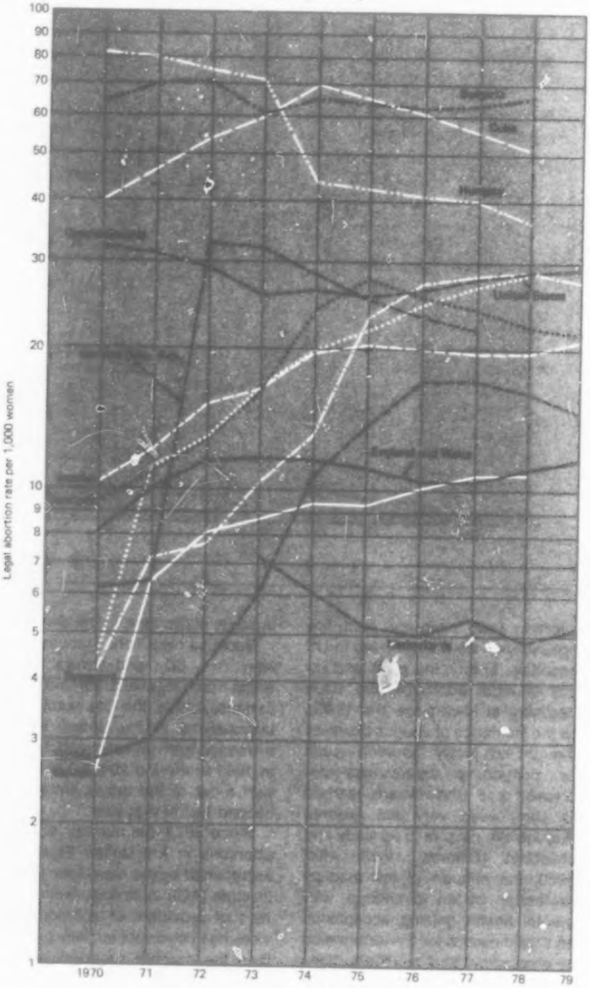
The Americas

For almost a century prior to about 1960, the great majority of the medical profession in the United States interpreted the existing restrictive abortion laws narrowly, and few pregnancies were terminated in US hospitals. In fact, the rates and ratios of legal abortions had been declining at least since the 1940s, as the incidence of various diseases thought to justify abortion—such as pulmonary tuberculosis—decreased and obstetricians learned to carry even very sick women through the risks of pregnancy and childbirth (*Erhardt, 1970*). After 1960, the attitude of the medical profession began to change, with mental health gaining acceptance as a valid reason for the termination of pregnancy, and more abortions were performed (*Tietze, 1970*). This trend was accelerated after the passage of more liberal abortion laws in some states later in the decade.

Because New York State, mainly New York City, and several other areas made legal abortion available to nonresidents, the total number of terminations in the United States increased from an estimated 50,000 in 1969 to around 200,000 in 1970, with most of the increment in the second half of that year.

Since 1973, the number of legal abortions in the United States as ascertained by the Alan Guttmacher Institute (AGI) in its nationwide surveys of providers of abortion services has been substantially greater than the number reported by the Centers for Disease Control (CDC). The reason for this discrepancy is that the CDC obtains most of its

FIGURE 4 Legal abortion rates per 1,000 women aged 15-44: Selected countries, 1970-79 (Semilog scale)



data from state health departments. After the decisions by the Supreme Court of the United States on 22 January 1973, abortion services became available in areas where they had not existed before. Many states, however, did not establish reporting systems until late 1973 or even later and some have not yet done so, thus causing a shortfall of about 17 percent in the CDC statistics for 1973, which continued at approximately the same level during 1974-78. While the annual increment in the number of legal abortions was reduced from 23 percent in 1971-74, to 14 percent in 1974-77, and to 7 percent from 1977 to 1978, the total number passed the one million mark in 1975 and reached about 1.4 million in 1978, according to the latest AGI survey, with an abortion ratio of 294 per 1,000 known pregnancies, excluding those ending in spontaneous fetal death. For 1979 a total of 1,540,000 has been projected (*Henshaw, 1981*). Since probably not more than 2 million of the 3.5 million births from July 1979 through June 1980 were intended at the time of conception (estimate based on *Tietze, 1979c*), it would appear that about one-half of the unwanted or mistimed pregnancies were aborted.

It is difficult to assess the impact of the restrictions on public funding for abortion, resulting from the "Hyde Amendment," on the number of abortions performed. Rough estimates can be made for the fiscal year (FY) 1978.[1] About 238,000 or more than 80 percent of all Medicaid-eligible women obtaining abortions in FY 1977 lived in states continuing to pay for these services, while 56,600 lived in states where public funding became unavailable for most abortions in FY 1978. According to the experience of three states a sizable majority, perhaps three-fourths, of the Medicaid-eligible women in the latter group of states were able to obtain abortions in the private sector (*Gold, 1980; Trussell, 1980; United States, 1980a*). However, the number of Medicaid-funded abortions also declined by about 46,000 in those states where state funds were still available, probably because of widespread confusion among pregnant women and among providers of abortion services concerning the availability of Medicaid funding. It is not known how many of these women were able to obtain abortions in the private sector, but the experience of one state and the overall increment of almost 90,000 legal abortions from 1977 to 1978 suggest that most of them were able to do so. No estimates have yet been made for FY 1979 and subsequent years.

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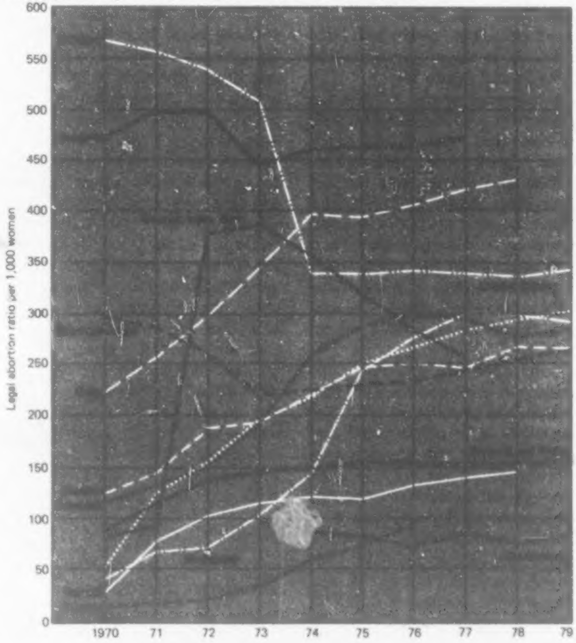
[1] The fiscal year of the United States extends from October through September; it is identified by the calendar year in which it ends.

FIGURE 5 Legal abortion ratios per 1,000 known pregnancies (Live births plus legal abortions): Selected countries, 1970–79



Around two-fifths of all legal abortions obtained in the United States in 1971 were performed outside the state of the woman's permanent residence. By 1975 the share of out-of-state abortions had declined to about one-tenth. In addition, almost three-tenths of all women obtaining abortions traveled, often considerable distances, to other communities within their state of residence.

Illegal abortion was widely and almost openly used as a method of fertility regulation in the nineteenth century, especially during the period 1840–60 (*Mohr, 1978*). While the numbers of illegal abortions and the abortion ratios per 1,000 pregnancies were probably lower than the corresponding statistics for legal abortions in the mid-1970s, the abortion rates per 1,000 women of reproductive age may well have been higher. Of the numerous estimates of the incidence of illegal abortion for more recent periods, one of the most widely quoted was made in 1957 by a committee that stated that "a plausible estimate of the frequency of induced abortion in the United States could be as low as 200,000 and as high as 1,200,000 per year. There is no objective basis for the selection of a particular figure between these two estimates as an approximation of the actual frequency" (*Calderone, 1958*, p. 180). In spite of this admonition, a round figure of one million abortions per year gained wide acceptance during the 1960s. The results of a later survey in North Carolina, using the randomized response technique, and of a retrospective estimate based on the numbers of legal abortions and of births in New York City during the period 1970-72 are compatible with this estimate (*Abernathy, 1970; Tietze, 1973a*).

The number of illegal abortions probably declined during the 1960s as more effective contraceptive methods were used by rapidly growing numbers of couples and surgical sterilization became increasingly available and acceptable. The decline was accelerated by the progressive liberalization of abortion laws, especially from 1970 onward, as reflected in a precipitous drop in the number of deaths attributed to illegal abortions (see Table 24 and Figure 15).

In Canada, where a restrictive abortion law was liberalized in 1969, the rates and ratios of legal abortions reported for 1970-79 remained substantially below the corresponding values for the United States. Around 10,000 Canadian women are known to have obtained legal abortions in the United States in 1975; the actual total may have been substantially higher. Comparable figures for later years are not available.

Cuba is the only country in Latin America in which abortions are performed in large numbers within the framework of the official health services. By 1974 the abortion rate approached 70 per 1,000 women aged 15–44, a level only slightly lower than the highest levels ever reported from Bulgaria and Hungary. From 1974 to 1978 the number of abortions declined 16 percent and the number of births 27 percent, suggesting increasing use of contraception. The abortion ratio rose to 431 per 1,000 known pregnancies in 1978.

The incidence of illegal abortion in other Latin American countries is believed to be high and increasing, especially in urban areas (*Gaslonde, 1976*). Although a number of Latin American authors have tried to quantify the incidence, the results of their studies have not been included in this report because they are not comparable with data for other countries. Although in some of these surveys attempts were made to separate induced abortions from those reported as spontaneous, the validity of the data is doubtful. The estimates published by the International Planned Parenthood Federation in 1974 suggest a total of close to 5 million illegal abortions per year for the entire region, corresponding to an abortion rate of at least 65 per 1,000 women aged 15–44 and an abortion ratio of almost 300 per 1,000 known pregnancies. Rates and ratios are doubtless higher in the larger cities. Hospitalization rates for complications of abortion on the order of 40 per 1,000 women of reproductive age have been reported from Mexico City (*Ordoñez, 1975*) and from Santiago, Chile (*Viel, 1975*). Although some women were hospitalized following spontaneous abortions, the numbers of induced abortions not requiring inpatient care were probably greater, possibly much greater. An annual rate of 100 illegal abortions per 1,000 women aged 15–44 in the late 1960s and early 1970s does not appear unrealistic, at least for Santiago, where the birth rate was lower than in Mexico City.

Western Europe

Trends of legal abortions in the Nordic countries have followed a common pattern with minor variations. After the enactment of the first liberalized Swedish abortion law in 1938, the rate of legal abortions increased from 0.4 per 1,000 women aged 15–44 during the period 1939–43 to 3.7 per 1,000 a decade later. Subsequently, the trend was reversed and the rate dropped below 2.5 per 1,000 women for several years; the upward trend was resumed in 1962, and by 1974 a rate of 19.2 per 1,000 women of reproductive age was reached. Authorization of abortion on request, in January 1975, brought only a minor increase to 20.2 per 1,000. Developments in Denmark were similar to those in Sweden, with higher rates in Denmark until 1967, and lower rates during subsequent years. After the legalization of abortion on request in late 1973, however, the abortion rate increased by one-half, overtaking that of Sweden. Marked increases in abortion rates have also been reported from Norway and especially from Finland, where they almost quadrupled between 1968 and 1973. Starting in 1974 in Finland and in 1976 in Denmark, numbers of abortions and abortion rates have declined. In Norway and Sweden, there have been only minor annual fluctuations over the past five years, the largest being an increase of 1.5 points in the abortion rate in Sweden from 1978 to 1979.

In Great Britain the attitudes and practices of the medical profession were basically conservative during the 1960s, especially with regard to nonprivate patients. About 2,300 abortions were reported by the National Health Service (NHS) hospitals in England and Wales in 1961; about 3,300 in 1964; and 9,700 in 1967. The total number of legal abortions, which includes those reported from NHS hospitals and an estimate of those performed in the private sector, almost doubled from 14,300 in 1961 to 27,200 in 1967. In that year the rate and ratio of legal abortions in England and Wales were about ten times as high as the corresponding figures estimated for the United States. They were also roughly equal to the rate and ratio in Sweden three or four years earlier, with the important difference that almost two-thirds of the legal abortions in England and Wales were done in the private sector and had to be paid for, whereas in Sweden all were done in public hospitals free of charge.

Major changes were ushered in by the passage of the Abortion Act of 1967. In England and Wales, the number of legal abortions performed on resident women under the provisions of the Act increased from 22,300 during the first eight months (27 April–31 December 1968) to 110,600 in 1973. From then until 1976–77 the number of abortions declined to about 102,000, followed by rises in 1978 and 1979 to 119,000. The abortion ratio continued to increase until 1975 and has since remained approximately constant in the vicinity of 150 per 1,000 known pregnancies. At present, both rates and ratios are substantially lower in England and Wales than in the United States or in the countries of northern Europe; the comparable figures for Scotland are about one-fourth lower than those for England and Wales. Almost one-eighth of all Scottish women seeking legal abortions obtain them in England.

In addition to more than 1.1 million legal abortions obtained by women residing in England and Wales during the entire period 1968–79, some 360,000 abortions involving nonresident women were reported, that is, one-fourth of the total number. Table 3 shows the distribution of these women by country of usual residence from 1969 onward. The annual fluctuations reflect clearly the changes in access to legal abortion in other countries. The enactment of a nonrestrictive abortion law in New York State in 1970 resulted in a sharp decline in the numbers of women from the United States and Canada. In 1972 the surfacing of officially tolerated abortion clinics in the Netherlands reduced the influx from that country and one year later from Belgium and the German Federal Republic as well. Arrivals from France reached a plateau in 1973–74, followed by a marked decline. The number of Italian women also began to decline in 1977 and had dropped substantially by 1979, while abortion-seeking women from Spain and Ireland continued to come in increasing numbers.

Substantial numbers of legal abortions are now being performed in the four European countries in which the laws were recently liberalized: Austria, France, the German Federal Republic, and Italy. No statistics are collected in Austria, and only limited data, which are not sufficient to permit any trend to emerge, have been obtained for the other three countries, in which reporting is believed to be grossly incomplete. In France, according to one estimate, the actual number of legal abortions in 1976 was on the order of 250,000, or almost twice the number reported (*Blayo, 1979*). In the Federal Republic, studies in West Berlin and in Munich have demonstrated that in these cities only 60 percent and 50 percent, respectively, of all legal abortions were reported to the national authorities (*Hickl, 1980*). In addition, large numbers of German women, especially residents of Bavaria, are said to seek abortions in Vienna. The total number of abortions obtained in the Federal Republic and abroad may well approach 200,000 per year.

The numbers of abortions performed in the Netherlands on women from neighboring countries, mainly the German Federal Republic, have declined in recent years from about 84,000 in 1975 to 41,400 in 1979 (*Ketting, 1980*). The abortion rate for Dutch women, on the other hand, is the lowest in the world among all countries with easy access to pregnancy termination and reliable statistics.

Eastern Europe

The liberalization of abortion laws in most countries of eastern Europe during the 1950s resulted in spectacular increases in the incidence of legal abortion during the years that followed. The most comprehensive and reliable information is available for Hungary and Czechoslovakia.

In Hungary, boards for the authorization of abortion were established in the early 1950s. The increasing number of legal abortions since 1953 indicates the progressive liberalization of the policies of these boards. After the law of 1956 introduced abortion on request, the number of legal abortions increased, at first rapidly and then more slowly, until it reached a peak of 206,800 in 1969. Between that year and 1973, a decline of 18 percent was recorded. The number of legal abortions exceeded the number of live births during 1959–73, with the abortion ratio reaching a maximum of 582 per 1,000 known pregnancies in 1964. Restrictions enacted in 1973, which took effect on 1 January 1974, resulted in an abrupt drop of about 40 percent in the number of abortions. Concurrently, the number of abortions on medical grounds rose from 4,000 (2.4 percent) to almost 12,000 (11.8 percent). The pattern of gradual decline was resumed during 1975–79.

In Czechoslovakia, legalization of abortion for nonmedical reasons in 1957 was preceded by almost two years of public discussion. Moderate increases in the abortion rate in 1956–57 reflected the changing attitude of the medical profession. Passage of a new and liberalized abortion law in December 1957 was followed by an eightfold rise in the number of legal abortions in the next year. The rise continued at a decelerating pace until 1961, when the total reached a peak of 94,300, followed by a decline to fewer than 71,000 in 1963–64, obviously in response to restrictions imposed in 1962. This drop was followed by another rise to 102,800 in 1969, exceeding the peak of 1961, and another decline to 81,200 in 1973.

Since 1976 legal abortions are again increasing.

In Bulgaria, the restrictive decree of 1968 had only a temporary effect, as indicated by a drop in the number of legal abortions, followed by a resumed upward trend from 1969 to 1972. The more severe restrictions imposed in 1973 again resulted in a decline in the abortion rate of almost ten points, seven of which had been recovered by 1978.

In the German Democratic Republic, legal abortions declined from a moderately high level in 1950 to very low levels in the late 1950s and early 1960s. During these years, abortion practice appears to have been at least as restrictive in the German Democratic Republic as it was in the Federal Republic. From 1963 through 1972, the only statistics available are those for the District of Rostock, where the implementation of the law may have been more liberal than elsewhere. These statistics show a rise in abortion rates and ratios from 1964 to 1966, followed by a period of stability until 1971. The liberalization of the abortion statute in early 1972 produced a steep increase in the number of legal abortions, confirmed by nationwide data for 1973. Over the last few years, numbers, rates, and ratios have declined at a moderate pace.

The data for Romania shown in Table 2 are not directly comparable with those for the other countries because they are not limited to legal terminations of pregnancy but include women admitted to hospitals for aftercare or the treatment of complications of spontaneous and illegal abortions. Prior to November 1966, when Romania's restrictive abortion law came into force, the great majority of reported abortions, probably 90 percent in most years, were legal terminations. Since then an unknown but apparently increasing proportion have been hospitalizations after illegal abortions, as indicated by the upward trend of abortion-related mortality (see Table 25 and Figure 16). It is known that the 206,000 abortions reported for 1967 included only 51,700 legal abortions (*WHO, 1968*), but no breakdown of the abortion totals into legal and "other" abortions has been published for any subsequent year.

The USSR published some statistics on legal abortions during the 1920s and 1930s, but they did not cover the entire country. Although it has been reported that abortion statistics are currently compiled in the USSR, no figures have been published officially for almost four decades. The figures for 1960, 1965, and 1967 shown in Table 2 are based on two abortion ratios (abortions per birth) and an abortion rate per 1,000 population, respectively. It is not certain that these statistics refer to the entire population of the USSR nor that they are limited to legal abortions, excluding women admitted to hospitals for aftercare or for the treatment of complications. The round figure of ten million legal abortions in 1970 is an estimate published by the International Planned Parenthood Federation. A substantially lower number of legal abortions is suggested by a statement attributed to the chief gynecologist of Moscow, Dr. Yuri Bloshansky: "For each birth we figure two abortions. In Moscow we have . . . about 200,000 abortions [in 1973]. That includes both abortions and miscarriages. Abortions are about 85 percent or 170,000" (*Smith, 1976*, pp. 141–142). Since the abortion ratio is almost certainly lower in the USSR as a whole than it is in Moscow, a total of 6.5 million legal abortions, corresponding to a rate of about 115 per 1,000 women aged 15–44, would seem to be compatible with Dr. Bloshansky's statement.

Asia, Africa, and Oceania

Abortion statistics for these continents are limited in quantity and quality. Japan has the longest series of national data. The reported number of legal abortions and the abortion rate and ratio in that country reached their peaks in the late 1950s. From then to 1979 the number of abortions declined by 46 percent; the abortion rate per 1,000 women of reproductive age, by 56 percent; and the abortion ratio per 1,000 known pregnancies, by about 35 percent.

Because the variation of abortion rates and ratios among the prefectures of Japan is far greater than could be explained by differences in the level of urbanization and other socioeconomic factors, Japanese scholars have argued that the reporting of legal abortions by physicians performing them is grossly incomplete in many places. According to estimates by Muramatsu, also shown in Table 2, it would appear that a substantial majority of legal abortions escapes registration, that the completeness of reporting declined from 1955 to 1970 and improved slightly thereafter, and that the number of abortions in 1975 still exceeded the number of births by about 350,000 or one-fifth. The high abortion rate and ratio doubtless reflect, to a large extent, the restricted availability of modern contraceptive methods, especially the pill and surgical sterilization, in Japan (*Coleman, 1978*).

In the Republic of Korea the incidence of abortion increased rapidly during the 1960s, especially in Seoul and other urban areas. According to estimates based on a sample survey of 6,300 ever-married women aged 15–44, the abortion rate increased by 180 percent between 1960 and 1971 during a period when abortions were technically illegal but could be readily obtained from physicians, mainly specialists in obstetrics and gynecology (*Hong, 1976*, p. 163). Although the data collected in this survey were believed to be among the most complete on abortion experience obtained by direct questioning, they have recently been shown to be quite incomplete. A survey of hospitals and physicians in Seoul providing abortion services, conducted in late 1977 and early 1978, generated an estimate of 480,000 abortions to residents, corresponding to an abortion rate of 235 per 1,000 women aged 15–44. This rate is 3.7 times higher than the rate estimated for Seoul, 1969–71, by the earlier survey and is very high, even in the context of a metropolitan population. The result of the provider survey probably reflects in part a continuing increase in the incidence of abortion in Seoul but also the exclusion of unmarried women from the sample population and incomplete reporting by ever-married respondents.

Available statistical information on legal abortions in the People's Republic of China is limited to a few provinces, cities, and rural counties. In 1978 an abortion ratio of 217 per 1,000 known pregnancies was reported for Guandong Province and 394 per 1,000 for highly urbanized Tianjian. Based on the reported number of 18 million births, an abortion ratio of perhaps 300 for the entire country suggests a total of 8–10 million abortions (*Chen, 1980a*), substantially less than the almost 20 million implied in the worldwide IPPF (*1974*) estimate of 55 million abortions. The abortion rate would be about 20 per 1,000 women aged 15–44. Higher abortion ratios, on the order of 500 per 1,000 known pregnancies, have been reported for some cities; however, these ratios may include abortions obtained by nonresidents (*Tien, 1980*). In Taiwan, abortions remain illegal, but physicians appear to be performing them readily. Direct questioning in a series of surveys produced increasing percentages of women reporting induced abortion (*Freedman, 1974; Sun, 1978*), but a survey in one county, using the randomized response technique (*Chi, 1972*), suggests a much higher level of incidence than admitted to the interviewers.

The number of legal abortions performed under Singapore's liberalized abortion law of 1969 increased from year to year until 1978, when the abortion rate reached 28.9 per 1,000 women aged 15–44, higher than in the United States and equal to that in Czechoslovakia. A minor decline was reported in 1979, possibly reflecting success of the national family planning program, including heavy reliance on surgical sterilization. In Hong Kong, legal abortions are still comparatively rare; however, many Hong Kong residents obtain abortions in nearby communities in the People's Republic of China.

Surveys of married women in Malaysia (*Sinnathuray, 1977*) and of providers of abortion services in the Philippines (*Flavier, 1980*) and in Thailand (*Narkavonnakit, 1979*) have documented the prevalence of illegal abortion in these countries. It is not possible, however, to derive national estimates of abortion rates and ratios from these data.

For India, the International Planned Parenthood Federation estimated 6.4 million illegal abortions in 1970, corresponding to an abortion ratio of about 200 per 1,000 known pregnancies and an abortion rate in the vicinity of 55 per 1,000 women aged 15–44 (*IPPF, 1974*). Implementation of the new abortion statute, which became effective on 1 April 1972, has been slow and geographically uneven. According to reports from each state, which may have been incomplete, only 312,800 "medical terminations of pregnancy" (MTP) were performed during the fiscal year ending 31 March 1979; the reported rate of legal abortions was 2.3 per 1,000 women aged 15–44, and the abortion ratio, about 12 per 1,000 known pregnancies. Almost one-half of all legal abortions reported in 1977/78 were performed because of contraceptive failure and another 10 percent for "environmental," presumably social, reasons. (*India, 1980*).

Tunisia is the only country with a high birth rate—and the only Muslim country—in which pregnancy termination has been made an integral part of a national family planning program. From 1966 to 1972, with elective abortion authorized only for women with five or more living children, abortions increased at a modest, although accelerating, pace. By 1974, the first full year that abortion on request was available to all women, the rate of "social abortions" had jumped to 11.0 per 1,000 women aged 15–44, almost equal to that of residents in England and Wales; three years later it reached 17.2 but then dropped to 14.6 per 1,000 in 1979. The number of legal abortions in the private sector has been estimated at 3,600, which would raise the abortion rate by about three points (*Charfeddine, 1980*).

Zambia's liberalized abortion law of 1972 has been implemented on a very limited scale, at least in part due to lack of equipment and trained staff.

The incidence of illegal abortion is believed to be very high in the expanding urban areas of many African countries.

For Australia, the Royal Commission on Human Relationships recently estimated that "there are 60,000 or more abortions in Australia each year," corresponding to an abortion rate of 21.7 per 1,000 women aged 15–44 and an abortion ratio of about 200 per 1,000 known pregnancies (*Australia, 1977,* p. 198). This estimate is based on several surveys of hospitals, clinics, and medical practitioners throughout Australia, sponsored by the Commission. Three nonprofit clinics reported a total of 20,000 procedures; it is not clear whether these figures include nonresidents. In New Zealand, the number of legal abortions declined from 5,800 in 1977 to only 2,700 during the first fiscal year following the imposition of legal restrictions; the next 12 months brought a rebound to 4,100. At least 4,000 New Zealand women obtained abortions in Australia during 1977/78 (*Geiringer, 1979,* p. 43); the corresponding number in 1979/80 appears to have been substantially smaller (*New Zealand, 1980*).

TABLE 2 Number of legal abortions, abortion rates, and abortion ratios: Selected areas, years, and characteristics

Area, years, and characteristics	Number of abortions[1]	ABORTION RATE PER 1,000		ABORTION RATIO PER 1,000	
		Total population	Women 15-44	Live births[2]	Known pregnancies[3]
Bulgaria[4,5]					
1953[6]	1,100	0.15	0.6	7	7
1954	900	0.12	0.5	6	6
1955	2,200	0.29	1.2	15	15
1956	2,000	0.27	1.2	14	14
1957	31,700	4.1	18.2	227	185
1958	38,100	4.9	21.8	277	217
1959[7,8]	46,200	5.9	26.3	334	250
1960	55,600	7.1	31.6	400	286
1961	69,500	8.8	39.1	511	338
1962	77,400	9.7	42.3	581	368
1963[9]	84,000	10.4	45.3	638	390
1964	92,300	11.3	49.1	719	418
1965	97,200	11.6	51.3	782	439
1966	102,200	12.4	53.9	825	452
1967	109,200	13.1	57.7	821	451
1968	91,200	10.9	48.1	641	408
1969	108,100	12.8	57.1	767	434
1970[10]	120,900	14.2	64.0	882	469
1971	132,500	15.5	70.2	993	498
1972	133,600	15.6	70.9	986	497
1973	115,400	13.4	61.2	799	444
1974	125,000	14.4	66.4	851	460
1975	123,700	14.2	65.8	854	461
1976	121,100	13.8	64.5	854	461
1977[11]	122,900	14.0	65.6	884	469
1978	127,800	14.5	68.3	937[12]	484[12]
Canada[13]					
1970	11,200	0.5	2.6	30	29
1971	30,900	1.4	6.6	83	77
1972	38,900	1.8	8.2	112	101
1973	43,200	2.0	8.8	127	113
1974	48,100	2.1	9.5	136	120
1975	49,300	2.2	9.5	133	118
1976	54,500	2.4	10.3	152	132
1977	57,600	2.5	10.6	159	137
1978	62,300	2.7	11.3	174[12]	148[12]
1979	65,000	2.7	11.6	—	—
Including residents of Canada obtaining abortions in the United States					
1975[14]	59,000	2.6	11.4	159	137
Cuba					
1968[15]	28,500	3.4	16.7	117	105
1969	46,100	5.5	26.6	192	161
1970	70,500	8.2	40.2	283	221
1971	84,800	9.8	47.4	336	252
1972	100,000	11.3	54.9	422	297
1973	112,100	12.4	60.3	523	343
1974	131,500	14.3	69.5	664	399
1975	125,100	13.5	65.3	662	398
1976	121,400	12.8	61.0	681	405
1977[16]	114,800	12.0	55.9	724	420
1978	110,400	11.3	52.1	757	431

TABLE 2 (continued)

Area, years, and characteristics	Number of abortions[1]	ABORTION RATE PER 1,000		ABORTION RATIO PER 1,000	
		Total population	Women 15-44	Live births[2]	Known pregnancies[3]
Czechoslovakia					
1954[17]	2,800	0.22	1.0	11	10
1955	2,100	0.16	0.8	8	8
1956	3,100	0.23	1.1	12	12
1957	7,300	0.5	2.7	29	28
1958[18]	61,400	4.6	22.8	280	219
1959	79,100	5.8	29.3	365	267
1960	88,300	6.5	32.5	405	288
1961	94,300	6.8	34.1	432	301
1962	89,800	6.5	31.5	403	287
1963	70,500	5.1	24.1	290	225
1964	70,700	5.0	23.6	298	229
1965[19]	79,600	5.6	26.3	354	261
1966	90,300	6.3	29.6	412	292
1967	96,400	6.7	31.4	452	311
1968	99,900	7.0	32.4	456	313
1969	102,800	7.1	33.1	457	314
1970	99,800	6.9	32.3	427	299
1971	97,300	6.8	31.4	398	285
1972	91,300	6.3	29.2	347	258
1973	81,200	5.6	25.9	280	219
1974	83,100	5.7	26.4	286	223
1975	81,700	5.5	25.9	298	229
1976	84,600	5.7	26.8	298	230
1977	89,000	5.9	28.1	318	241
1978	92,500	6.1	28.1	335	251
1979	94,300	6.2	29.4	359	264
Denmark[20]					
1940-44[21]	800	0.2	0.9	10	10
1945-49	2,300	0.6	2.5	27	26
1950-54	4,700	1.1	5.1	61	58
1955-59	4,300	1.0	4.6	57	54
1960-64	4,100	0.9	4.3	51	49
1965-69	6,100	1.3	6.2	79	73
1970	9,400	1.9	9.4	129	114
1971	11,200	2.2	11.1	148	129
1972	13,000	2.6	12.9	176	150
1973	16,500	3.3	16.2	233	189
1974	24,900	4.9	24.2	345	256
1975	27,900	5.5	27.0	402	287
1976	26,800	5.3	25.8	427	300
1977	25,700	5.0	24.4	413	292
1978	23,700	4.6	22.3	389	280
1979	23,200	4.5	21.6	398	284
England and Wales[22]					
1961	14,300	0.3	1.6	17	17
1962	16,800	0.4	1.8	20	19
1963	16,600	0.4	1.8	19	19
1964	18,300	0.4	1.9	21	21
1965	19,500	0.4	2.1	23	22
1966	21,400	0.4	2.3	25	24
1967	27,200	0.6	2.9	33	32
Type of service *NHS hospitals[23]*					
1961	2,300	—	—	—	—
1962	2,800	—	—	—	—
1963	2,600	—	—	—	—
1964	3,300	—	—	—	—
1965	4,500	—	—	—	—
1966	6,400	—	—	—	—
1967	9,700	—	—	—	—
Private sector[1]					
1961	12,000	—	—	—	—
1962-63[21]	14,000	—	—	—	—
1964-66	15,000	—	—	—	—
1967	17,500	—	—	—	—

TABLE 2 (continued)

Area, years, and characteristics	Number of abortions[1]	ABORTION RATE PER 1,000		ABORTION RATIO PER 1,000	
		Total population	Women 15-44	Live births[2]	Known pregnancies[3]
England and Wales (cont.)					
Abortions under the 1967 Abortion Act					
1968[24,25]	23,600	—	—	—	—
1969	54,800	—	—	—	—
1970	86,600	—	—	—	—
1971	126,800	—	—	—	—
1972	159,900	—	—	—	—
1973	167,100	—	—	—	—
1974[26]	162,900	—	—	—	—
1975	139,700	—	—	—	—
1976	129,700	—	—	—	—
1977	133,000	—	—	—	—
1978	141,600	—	—	—	—
1979[27]	147,500	—	—	—	—
Residential status					
Residents[28]					
1968	22,300	0.7	3.5	40	39
1969	49,800	1.0	5.3	64	60
1970	76,000	1.6	8.1	96	87
1971	94,600	1.9	10.1	126	112
1972	108,600	2.2	11.5	158	136
1973	110,600	2.2	11.7	170	145
1974	109,400	2.2	11.6	175	149
1975	106,200	2.2	11.2	179	152
1976	101,900	2.1	10.6	180	152
1977	102,700	2.1	10.6	179	151
1978	111,900	2.3	11.4	179	152
1979	119,000	2.4	12.0	184	156
Nonresidents					
1968[28]	1,300	—	—	—	—
1969	5,000	—	—	—	—
1970	10,600	—	—	—	—
1971	32,200	—	—	—	—
1972	51,300	—	—	—	—
1973	56,600	—	—	—	—
1974	53,500	—	—	—	—
1975	33,500	—	—	—	—
1976	27,800	—	—	—	—
1977	30,300	—	—	—	—
1978	29,700	—	—	—	—
1979[27]	28,400	—	—	—	—
Type of service (residents)[29]					
NHS hospitals					
1968	14,500	—	—	—	—
1969	33,500	—	—	—	—
1970	47,400	—	—	—	—
1971	53,500	—	—	—	—
1972	56,900	—	—	—	—
1973	55,500	—	—	—	—
1974	56,100	—	—	—	—
1975	50,900	—	—	—	—
1976	50,600	—	—	—	—
1977	52,500	—	—	—	—
1978	55,000	—	—	—	—
Non-NHS premises					
1968	7,800	—	—	—	—
1969	16,300	—	—	—	—
1970	28,600	—	—	—	—
1971	41,100	—	—	—	—
1972	51,700	—	—	—	—
1973	55,100	—	—	—	—
1974	53,400	—	—	—	—
1975	55,300	—	—	—	—
1976	51,300	—	—	—	—
1977	50,100	—	—	—	—
1978	56,800	—	—	—	—

TABLE 2 (continued)

Area, years, and characteristics	Number of abortions[1]	ABORTION RATE PER 1,000		ABORTION RATIO PER 1,000	
		Total population	Women 15-44	Live births[2]	Known pregnancies[3]
Finland					
1951-55[21,30]	3,500	0.8	3.7	38	37
1956-60	5,200	1.2	5.7	67	63
1961-65	5,400	1.2	5.6	71	67
1966	5,200	1.1	5.1	68	64
1967	5,600	1.2	5.4	73	68
1968	6,300	1.3	6.0	90	82
1969	8,200	1.7	7.8	124	110
1970	14,800	3.2	13.8	241	194
1971[31]	20,400	4.4	18.9	337	252
1972	22,200	4.8	20.4	384	278
1973	23,400	5.0	22.4	388	279
1974	22,800	4.9	21.8	362	266
1975	21,500	4.6	20.4	316	240
1976[32]	19,800	4.2	18.6	300	231
1977	17,800	3.8	16.7	277	217
1978	16,900	3.6	15.8	265[12]	209[12]
1979	15,900	3.3	14.7	—	—
France[33]					
1976[34]	134,200	2.5	12.3	183	155
1977	150,900	2.8	13.8	203	169
1978[35]	150,200	2.8	13.6	203	169
1979	155,300	2.9	13.9	205[12]	170[12]
German Democratic Republic[36]					
1950[37]	26,400	1.44	6.4	86	79
1951	5,000	0.27	1.2	16	16
1952	3,600	0.20	0.90	12	12
1953[38]	2,400	0.13	0.62	7.9	7.9
1954	1,700	0.09	0.44	5.8	5.8
1955	1,200	0.07	0.32	4.3	4.3
1956	1,000	0.06	0.26	3.6	3.6
1957	900	0.05	0.25	3.4	3.4
1958	900	0.05	0.26	3.3	3.3
1959	80[illegible]	0.04	0.22	2.6	2.6
1960	800	0.04	0.22	2.6	2.6
1961	800	0.05	0.24	2.8	2.8
1962	700	0.04	0.22	2.5	2.5
1963[39]	—	—	0.5	5	5
1964	—	—	0.7	7	7
1965	—	—	3.6	37	36
1966	—	—	7.1	77	72
1967	—	—	7.2	84	77
1968	—	—	6.8	83	76
1969	—	—	6.1	79	74
1970	—	—	6.2	85	78
1971	—	—	6.4	96	83
1972	—	—	33.0	556	357
1972[40]	114,000	6.7	33.1	599	374
1973[41]	110,800	6.5	32.2	619	383
1974	99,700	5.9	28.8	553	356
1975	87,800	5.2	25.2	468	319
1976	81,900	4.9	23.3	392	282
1977[40]	80,100	4.8	22.5	350	260
German Federal Republic[33,42]					
1950[43,44]	9,500	0.21	0.8	12	12
1951	8,000	0.17	0.7	10	10
1952	6,500	0.14	0.6	8	8
1954	4,600	0.10	0.4	6	6
1968[45]	2,800	0.05	0.2	3	3
1969	3,400	0.06	0.3	4	4
1970[46]	4,900	0.08	0.4	6	6
1971	7,000	0.11	0.6	9	9
1972	9,800	0.16	0.8	15	15
1973	13,000	0.21	1.0	21	20
1974	17,800	0.29	1.4	29	28

TABLE 2 (continued)

Area, years, and characteristics	Number of abortions[1]	ABORTION RATE PER 1,000		ABORTION RATIO PER 1,000	
		Total population	Women 15-44	Live births[2]	Known pregnancies[3]
German Federal Republic (cont.)					
1975	19,100	0.31	1.5	32	31
1976[47]	21,400	0.35	1.7	36	35
1977	54,300	0.88	4.1	93	85
1978	73,500	.20	5.5	129	114
1979	82,800	1.36	6.2	139	122
Including residents of the Federal Republic obtaining abortions in the Netherlands and in England[33,46]					
1975	83,500	1.4	6.6	139	122
1977	111,000	1.8	8.7	191	160
1978	118,800	1.9	9.2	208	172
1979	115,600	1.9	8.8	195	163
Hong Kong[48]					
1973	200	0.05	0.2	2	2
1974	600	0.14	0.6	7	7
1975	1,000	0.24	1.1	13	13
1976	2,200	0.49	2.3	27	26
1977	3,800	0.84	3.9	48	46
1978	5,500	1.2	5.4	67	63
1979	7,000	1.5	6.7	86[12]	79[12]
Hungary					
1950[49]	1,700	0.2	0.8	9	9
1951	1,700	0.2	0.8	9	9
1952	1,700	0.2	0.8	9	9
1953	2,800	0.3	1.3	13	13
1954	16,300	1.7	7.5	75	70
1955	35,400	3.6	16.3	176	150
1956	82,500	8.4	38.3	464	317
1957[50]	123,400	12.6	58.0	744	426
1958	145,600	14.8	68.7	940	484
1959	152,400	15.3	72.1	1,023	506
1960	162,200	16.2	76.4	1,129	530
1961	170,000	17.0	79.4	1,267	559
1962	163,700	16.3	75.2	1,251	556
1963	173,800	17.2	78.4	1,316	568
1964	184,400	18.2	82.2	1,393	582
1965	180,300	17.8	80.0	1,328	570
1966	186,800	18.3	82.8	1,315	568
1967	187,500	18.4	83.1	1,213	548
1968	201,100	19.6	88.8	1,310	567
1969	206,800	20.1	90.6	1,338	572
1970	192,300	18.6	83.5	1,296	565
1971	187,400	18.1	81.1	1,242	554
1972	179,000	17.2	77.5	1,161	537
1973	169,600	16.3	73.5	1,024	506
1974	102,000	9.7	44.3	514	340
1975	96,200	9.1	41.9	515	340
1976[51]	94,700	8.9	41.5	519	342
1977	89,100	8.4	39.2	516	341
1978[52]	83,500	7.8	37.0	512	339
1979	80,800	7.5	35.9	525	344
Iceland					
1970-72[21,53]	130	0.63	3.0	30	29
1973-75	250	1.18	5.5	58	55
1976-78	420	2.47	8.6	101	92
India[33,54,55]					
1972/73[56]	24,300	0.04	0.2	1	1
1973/74	44,800	0.08	0.4	2	2
1974/75	97,800	0.18	0.8	4	4
1975/76	214,200	0.35	1.7	9	9
1976/77	278,900	0.44	2.1	11	11
1977/78	247,000	0.39	1.8	9	9
1978/79[57]	312,800	0.47	2.3	12	12

TABLE 2 (continued)

Area, years, and characteristics	Number of abortions[1]	ABORTION RATE PER 1,000 Total population	ABORTION RATE PER 1,000 Women 15-44	ABORTION RATIO PER 1,000 Live births[2]	ABORTION RATIO PER 1,000 Known pregnancies[3]
Italy					
1979[58]	187,600	3.3	15.8	288	224
Japan					
1950-54[21,33,59]	827,400	9.7	40.7	414	293
1955-59	1,135,800	12.5	52.2	695	410
1960-64[60]	983,600	10.4	41.9	598	374
1965-69	780,200	7.8	30.3	433	300
1970	732,000	7.1	28.0	375	273
1971	739,700	7.1	28.2	364	267
1972	732,600	6.8	27.6	353	261
1973	700,500	6.4	26.3	340	254
1974	679,800	6.2	25.5	346	257
1975	671,000	6.0	25.2	353	261
1976	664,100	5.9	24.9	372	271
1977	641,200	5.6	24.1	354	261
1978	618,000	5.4	23.3	368	269
1979	613,700	5.3	23.1	372[12]	271[12]
1955[61,62]	2,790,000	31.1	131.9	1,643	622
1960	3,150,000	33.5	138.1	1,972	663
1965	2,750,000	27.8	108.6	1,747	636
1970	2,780,000	26.6	104.9	1,425	588
1975[63]	2,250,000	20.1	84.2	1,205	547
Netherlands[64]					
Residential status					
Residents					
1973	20,300	1.5	7.3	107	97
1974	17,600	1.3	6.2	93	85
1975	15,000	1.1	5.2	92	83
1976	14,800	1.1	5.0	84	78
1977[65]	16,100	1.2	5.4	92	85
1978	15,000	1.1	4.9	86	79
1979	16,200	1.2	5.3	92	85
Nonresidents, 1979					
German Federal Republic	32,000	—	—	—	—
Belgium	7,500	—	—	—	—
France	800	—	—	—	—
Other countries[66]	1,100	—	—	—	—
New York City					
1960-62[67]	340	0.04	0.21	2.1	2.1
1965-67	470	0.06	0.28	3.1	3.1
1970[68]	44,000	—	—	—	—
1971[69]	206,700	—	—	—	—
1972	203,200	—	—	—	—
1973	149,800	—	—	—	—
1974	120,800	—	—	—	—
1975[70]	106,300	—	—	—	—
1976	102,000	—	—	—	—
1977	102,500	—	—	—	—
1978[52]	105,800	—	—	—	—
1979	104,400	—	—	—	—
Residential status					
Residents					
1971	67,000	8.5	41.0	538	350
1972	70,800	9.1	43.3	622	384
1973	81,200	10.4	49.0	734	423
1974	85,900	11.1	52.3	781	438
1975	81,400	10.5	49.5	742	426
1976	83,700	10.9	50.7	759	431
1977	86,700	11.3	52.4	798	444
1978	89,700	11.8	54.2	844	458
1979	92,300	12.2	56.1	870[12]	465[12]

TABLE 2 (continued)

Area, years, and characteristics	Number of abortions[1]	ABORTION RATE PER 1,000		ABORTION RATIO PER 1,000	
		Total population	Women 15-44	Live births[2]	Known pregnancies[3]
New York City (cont.)					
Nonresidents[71]					
1971	139,700	—	—	—	—
1972	132,400	—	—	—	—
1973	68,600	—	—	—	—
1974	34,900	—	—	—	—
1975	24,900	—	—	—	—
1976	18,400	—	—	—	—
1977	15,800	—	—	—	—
1978	16,100	—	—	—	—
1979	12,200	—	—	—	—
New Zealand					
1976[72]	4,700	1.5	7.3	83	77
1977	5,800	1.9	8.9	112	100
1978/79[73]	2,700	0.9	3.8	51	49
1979/80	4,100	1.3	5.7	—	—
Norway					
1968[74,75]	5,300	1.4	7.3	78	72
1969	6,500	1.7	8.9	98	89
1970	7,900	2.0	10.9	122	109
1971	10,400	2.7	14.1	159	137
1972	12,200	3.1	16.4	193	162
1973	13,700	3.5	18.2	226	185
1974	15,200	3.8	20.0	263	208
1975	15,100	3.8	19.7	277	217
1976	14,800	3.7	18.9	282	220
1977[57]	15,500	3.8	19.6	305	233
1978	14,800	3.6	18.4	284	221
1979[76]	14,500	3.5	17.7	285	222
Poland[5,77,78]					
1965	168,600	5.4	24.3	312	238
1966	158,000	5.0	22.4	300	231
1967	155,000	4.9	21.6	299	230
1968	153,600	4.8	21.0	289	224
1969	148,800	4.6	20.0	277	217
1970	148,400	4.6	20.0	268	211
1971	135,000	4.1	18.0	237	192
1972	135,300	4.1	17.8	230	187
1973	138,600	4.2	18.0	227	185
1974	142,400	4.2	18.2	225	184
1975	138,600	4.1	17.5	215	177
1976	140,900	4.1	17.8	211	175
1977	143,500	4.1	18.1	216	178
1978	145,600	4.2	18.3	219[19]	179[19]
Type of service					
Hospitals					
1970	109,200	—	—	—	—
1971	97,700	—	—	—	—
1972	87,800	—	—	—	—
1973	87,700	—	—	—	—
1974	87,200	—	—	—	—
1975	81,000	—	—	—	—
1976	79,200	—	—	—	—
1977	74,800	—	—	—	—
1978	76,600	—	—	—	—
Ambulatory facilities					
1970	39,200	—	—	—	—
1971	37,300	—	—	—	—
1972	47,500	—	—	—	—
1973	50,800	—	—	—	—
1974	55,200	—	—	—	—
1975	57,700	—	—	—	—
1976	61,700	—	—	—	—
1977	68,700	—	—	—	—
1978	69,000	—	—	—	—

TABLE 2 (continued)

Area, years, and characteristics	Number of abortions[1]	ABORTION RATE PER 1,000		ABORTION RATIO PER 1,000	
		Total population	Women 15-44	Live births[2]	Known pregnancies[3]
Romania[79]					
1959[80]	578,000	31.8	139.1	1,606	616
1960	774,000	42.1	186.1	2,290	696
1961	865,000	46.7	205.4	2,764	734
1962	967,000	51.8	226.9	3,245	764
1963	1,037,000	55.2	240.4	3,564	781
1964	1,100,000	58.2	251.9	3,873	795
1965	1,115,000	58.6	252.3	4,034	803
1966	973,000	50.5	218.7	3,050	753
1967	206,000	10.6	46.0	333	250
1968	220,000	11.1	48.8	447	309
1969	258,000	12.9	56.9	580	367
1970	292,000	14.4	63.9	709	415
1971	330,000	16.2	71.9	838	456
1972	381,000	18.5	82.7	992	498
1973	376,000	18.1	81.3	931	482
1974[81]	335,000	15.9	72.0	791	442
1975	359,000	16.9	77.1	860	463
1976	383,000	17.9	82.6	911	477
1977	379,000	17.5	82.0	902	474
1978	394,000	18.0	85.6	956	489
1979	404,000	18.3	88.1	990[12]	498[12]
Scotland[82]					
1968	1,500	0.3	1.5	17	16
1969	3,500	0.7	3.6	40	38
1970	5,300	1.0	5.2	60	57
1971	6,300	1.2	6.3	75	70
1972	7,600	1.5	7.5	97	88
1973	7,500	1.4	7.4	104	94
1974	7,600	1.4	7.4	110	99
1975	7,300	1.4	7.1	108	97
1976	7,200	1.4	6.9	116	104
1977	7,300	1.4	7.0	116	104
1978	7,500	1.4	7.0	112	100
1979	7,800	1.5	7.3	113[12]	102[12]
Including residents of Scotland obtaining abortions in England[83]					
1968	1,100	0.2	1.0	11	11
1969	3,700	0.7	3.7	42	40
1970	5,600	1.1	5.5	64	60
1971	6,900	1.3	6.8	83	77
1972	8,400	1.6	8.3	110	99
1973	8,600	1.6	8.4	119	106
1974	8,600	1.6	8.4	125	111
1975	8,400	1.6	8.1	124	110
1976	8,100	1.6	7.8	131	115
1977	8,200	1.6	7.8	130	115
1978	8,[illegible]00	1.6	8.0	126	112
1979	8,800	1.7	8.2	128[12]	114[12]
Singapore[33,84]					
1970	1,900	0.9	4.1	42	41
1971	3,400	1.6	7.2	69	65
1972	3,800	1.8	7.7	75	70
1973	5,300	2.4	10.4	115	103
1974	7,200	3.2	13.6	172	146
1975	12,900	5.7	23.5	319	242
1976	15,500	6.8	27.5	377	274
1977	16,400	7.1	28.3	428	300
1978	17,200	7.4	28.9	428	300
1979	17,000	7.2	27.7	413	292
Sweden					
1939-43[21,85]	500	0.1	0.4	5	5
1944-48	2,600	0.4	1.7	24	24
1949-53	5,600	0.8	3.7	49	47
1954-58	4,200	0.8	2.9	39	38
1959-63	3,100	0.4	2.1	29	28

TABLE 2 (continued)

Area, years, and characteristics	Number of abortions[1]	ABORTION RATE PER 1,000		ABORTION RATIO PER 1,000	
		Total population	Women 15-44	Live births[2]	Known pregnancies[3]
Sweden (cont.)					
1964-68	7,800	1.0	5.2	71	67
1969	13,700	1.7	8.8	128	113
1970	16,100	2.0	10.2	143	125
1971	19,300	2.4	12.2	171	146
1972	24,200	3.0	15.2	218	179
1973	26,000	3.2	16.3	237	192
1974	30,600	3.8	19.2	284	221
1975	32,500	4.0	20.2	325	245
1976	32,400	3.9	20.0	334	251
1977	31,500	3.8	19.3	332	249
1978[85]	31,900	3.8	19.4	363	266
1979	34,700	4.2	20.9	358	264
Tunisia[86]					
1966[87]	1,400	0.3	1.5	6	6
1967	1,300	0.3	1.4	6	6
1968	2,200	0.5	2.4	11	11
1969	2,900	0.6	2.9	15	15
1970	2,700	0.5	2.7	14	14
1971	3,200	0.6	3.0	17	17
1972	4,600	0.8	4.2	22	21
1973[88]	6,500	1.2	6.0	34	33
1974	12,400	2.2	10.9	63	59
1975	16,000	2.8	13.7	78	72
1976	20,300	3.5	17.1	98	90
1977	21,200	3.6	17.2	103	94
1978	21,000	3.5	16.5	103[12]	93[12]
1979	19,200	3.1	14.6	—	—
United States					
1963[89]	5,000	0.03	0.13	1.3	1.3
1964	9,000	0.05	0.23	2.4	2.4
1965	7,000	0.04	0.18	1.9	1.9
1966	6,000	0.03	0.15	1.8	1.8
1967	9,000	0.05	0.22	2.6	2.6
1968	18,000	0.09	0.44	5.2	5.2
Ethnic group					
White					
1963-65	—	0.04	0.19	1.9	1.9
1966-68	—	0.06	0.29	3.5	3.5
Black and other					
1963-65	—	0.03	0.17	1.2	1.2
1966-68	—	0.06	0.29	2.4	2.4
Abortions reported to Centers for Disease Control[90]					
1970	193,500	0.9	4.5	52	50
1971	485,800	2.3	11.2	143	125
1972	586,800	2.8	13.2	184	155
1973	615,800	2.9	13.6	198	165
1974	763,500	3.6	16.5	240	193
1975	854,900	4.0	18.1	273	215
1976	988,300	4.6	20.6	303	232
1977	1,079,400	5.0	22.0	327	247
1978	1,157,800	5.3	23.1	342	255
Abortions reported to Alan Guttmacher Institute					
1973[91]	744,600	3.5	16.6	239	193
1974	898,600	4.2	19.6	282	220
1975	1,034,200	4.8	22.1	331	249
1976	1,179,300	5.5	24.5	361	265
1977	1,316,700	6.1	26.9	400	286
1978	1,409,600	6.5	28.2	417	294
1979[92]	1,540,000	7.0	30.2	435	303
Ethnic group[93]					
White					
1973[91]	548,800	3.0	14.0	217	178
1974	629,300	3.4	15.8	243	195
1975	701,200	3.6	17.3	276	217
1976	784,900	4.2	19.0	296	229
1977	888,780	4.8	21.2	334	250
1978	969,400	5.1	22.7	—	—

TABLE 2 (continued)

Area, years, and characteristics	Number of abortions[1]	ABORTION RATE PER 1,000		ABORTION RATIO PER 1,000	
		Total population	Women 15-44	Live births[2]	Known pregnancies[3]
United States (cont.)					
Black and other					
1973[91]	195,800	7.3	31.5	338	253
1974	269,200	9.9	42.0	457	313
1975	333,000	11.9	50.2	564	360
1976	394,400	13.9	57.5	630	387
1977	427,920	14.8	60.6	676	403
1978	440,200	14.9	60.4	—	—
Income level (1977)[93]					
Low (Medicaid-eligible)	294,600[94]	—	64.3	—	—
Higher	1,022,100	—	21.1	—	—
Type of service					
Hospitals					
1973[91]	395,700	—	—	—	—
1974	415,300	—	—	—	—
1975	413,500	—	—	—	—
1976	416,600	—	—	—	—
1977	391,480	—	—	—	—
1978	350,500	—	—	—	—
Nonhospital facilities[95]					
1973[91]	348,900	—	—	—	—
1974	483,300	—	—	—	—
1975	620,700	—	—	—	—
1976	762,600	—	—	—	—
1977	925,220	—	—	—	—
1978	1,059,100	—	—	—	—
USSR[96]					
1960[97]	8,500,000	40	170	1,600	615
1965[98]	11,700,000	50	220	2,750	733
1967[99]	13,150,000	55.7	240	3,200	762
1970[100]	10,000,000	41	180	2,300	700
Yugoslavia					
1963[101]	146,800	7.7	33.3	363	266
1964	156,600	8.2	35.1	392	282
1965	182,400	9.4	39.8	452	311
1966	195,500	9.9	42.2	495	331
1967	210,700	10.6	44.9	546	353
1969[102]	207,300	10.3	43.9	557	358

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1. All numbers rounded. Because of rounding, components may not add to totals. Data for most recent periods may be subject to revision.
2. Six months later, unless otherwise indicated.
3. Live births, plus legal abortions.
4. Includes abortions on request and for medical reasons.
5. Number of abortions shown in UN *Demographic Yearbook* includes "other abortions" (women admitted to hospitals for treatment of complications of spontaneous or illegally induced abortions).
6. 1953-58: *Starkaleff, 1961*.
7. 1959-62: *Klinger, 1970* (Abortions on request).
8. 1959-69: *Vasilev, 1974* (Abortions for medical reasons).
9. 1963-69: *Golemanov, 1973* (Abortions on request).
10. 1970-76: *Bulgaria, 1977*.
11. 1977-78: Response to questionnaire.
12. Ratios computed using births during calendar year.
13. *Canada, 1980*. Residents.
14. *Canada, 1976*. An estimate of 9,600 Canadian women obtaining abortions in the United States in 1975 appears on page 35. The same number is given for 1974 on page 81.
15. 1968-76: *Rodriguez Castro, 1978*.
16. 1977-78; 1968-76: *Cuba, 1979*.
17. 1954-57: *Vojta, 1961*.
18. 1958-64: *Frejka, 1968*.
19. 1965-79: *Czechoslovakia, 1980*.
20. *Denmark, 1978, 1979*, supplemented by response to questionnaire.
21. Annual averages.
22. 1961-67: The figures for the private sector and, therefore, the totals as well, are estimates. *Diggory, 1970*.
23. Reported therapeutic abortions in National Health Service hospitals.
24. 1968-73: Occurrences. *United Kingdom, 1974b*.
25. 27 April-31 December 1968. Rates and ratios computed on annual basis.
26. 1974-78: Occurrences. *United Kingdom, 1980c*.
27. Notifications. *United Kingdom, 1980b*.
28. 1968-78: Occurrences. *United Kingdom, 1974b* and *1980c*.
29. NHS = National Health Service. Armed Services' hospitals included with non-NHS premises in 1968-73, with NHS hospitals in 1974-78.
30. 1951-70: *Finland, 1972*.
31. 1971-75: *Härö, 1976*.

TABLE 2 (continued)

32. 1976-79: *Härö, 1980.*
33. Reporting incomplete.
34. 1976-77: *Blayo, 1979.*
35. 1978-79: *France, 1980.*
36. Includes East Berlin.
37. 1950-52: *Mehlan, 1968.*
38. 1953-62: *Mehlan, 1965.*
39. 1963-72: District Rostock only, with about 5 percent of the female population aged 15-44, and 6 percent of the live births of the German Democratic Republic. *Mehlan, 1974.*
40. *German Federal Republic, 1980a,* p. 194.
41. 1973-76: *German Democratic Republic, 1977.*
42. Includes West Berlin.
43. 1950-30 June 1976: Applications approved.
44. 1950-54: *Heiss, 1967,* pp. 70-71.
45. 1968-69: *Wolff, 1977.*
46. 1970-79: *German Federal Republic, 1980b.*
47. 1 July 1976-1979: Abortions performed.
48. *Hong Kong, 1980.*
49. 1950-56: *Hirschler, 1961.*
50. 1957-75: *Hungary, 1977.*
51. 1976-77: *Hungary, 1979a.*
52. 1978-79: Response to questionnaire.
53. *Iceland, 1979.*
54. Abortions performed under the National Family Planning Program.
55. Fiscal years ending 31 March.
56. 1972/78: *India, 1980.*
57. *Ramabhadran, 1980.*
58. *Italy, 1980.*
59. 1950-59: *Muramatsu, 1967,* p. 68.
60. 1960-79: *Japan, 1980.*
61. 1955-75: Estimates of abortions to married women.
62. 1955-70: *Muramatsu, 1973.*
63. Medium estimate. *Muramatsu, 1978.*
64. Estimates based on reports from the quasi-legal abortion clinics administered by Stimezo, supplemented by information obtained from hospitals. *Ketting, 1980.*
65. 1977-79: Including "menstrual regulation" procedures.
66. Mostly Italy and Spain.
67. 1960-62 and 1965-67: Annual averages, corrected for incomplete reporting. *Erhardt, 1970.*
68. July-December: *Pakter, 1971.*
69. 1971-74: *Pakter, 1975.*
70. 1975-77: *New York City, 1978.*
71. Including women of unknown residence.
72. 1976-77: *Facer, 1978-79.*
73. 1976/80: Notifications during fiscal years ending 31 March. *New Zealand, 1980.*
74. 1968-78: Applications approved.
75. 1968-76: *Norway, 1978.*
76. Abortions performed.
77. Includes abortions in hospitals and clinics. Excludes abortions in physicians' offices, believed to be numerous.
78. *Poland, 1979.*
79. Includes legal abortions and women admitted to hospitals for treatment of complications of spontaneous or illegally induced abortions.
80. 1959-73: *Ceterchi, 1975,* p. 2.
81. 1974-79: *Romania, 1980.*
82. *United Kingdom, 1978a,* supplemented by response to questionnaire.
83. *United Kingdom, 1974a,* vol. 2, p. 204, *1974b, 1978a, 1980c.*
84. Including the private sector. *Singapore, 1980.*
85. 1939-50: *Sweden, 1973.*
86. 1951-79: *Sweden, 1980.*
87. 1966-72: *Bchir, 1978,* pp. 96-106.
88. 1973-79: *Tunisia, 1979.*
89. Unofficial estimates based on survey of hospitals. *Tietze, 1970.*
90. 1970-76: *United States, 1980b.*
91. 1973-79: *Forrest, 1979; Henshaw, 1981.*
92. Projection.
93. Estimates based on number of abortions reported to AGI and distribution by ethnic group reported by CDC.
94. FY 1977. In FY 1978 the number of Medicaid-funded abortions dropped to 193,800 (*Gold, 1980*).
95. Clinics = 95 percent, physicians' offices = 5 percent.
96. May include women admitted to hospitals for aftercare or the treatment of complications of spontaneous or illegally induced abortions.
97. 1960 and 1965: Abortion ratios per birth given in source; other entries derived. *Serenko, 1969,* pp. 34-35.
98. Average of minimum and maximum estimates (2.5 and 3.0 abortions per birth).
99. Abortion rate per 1,000 population given in source; other entries derived. *Sokolova, 1970.*
100. *IPPF, 1974.*
101. 1963-67: Survey of hospitals. *Mojic, 1969.*
102. *Yugoslavia, 1975.*

TABLE 3 Legal abortions in England and Wales obtained by nonresidents, by country of usual residence, 1969-79

Country	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
Belgium	200	600	2,100	2,500	1,500	600	400	400	300	300	200
Canada	400	300	100	100	*	*	*	*	*	*	*
Denmark	*	100	200	100	*	*	*	*	*	*	*
France	500	2,300	12,000	25,200	35,300	36,400	14,100	4,600	4,100	3,200	3,000
German Federal Republic	1,600	3,600	13,600	17,500	11,300	6,000	3,400	2,400	1,700	1,200	700
Ireland, Northern	100	200	600	800	1,000	1,100	1,100	1,100	1,200	1,300	1,400
Ireland, Republic of	100	300	600	1,000	1,200	1,400	1,600	1,800	2,200	2,500	2,800
Italy	*	100	200	500	1,200	1,800	5,600	8,200	7,500	3,900	1,000
Netherlands	100	800	800	200	100	100	100	100	100	100	*
Scotland	200	300	500	800	1,100	1,000	1,100	1,000	800	1,000	1,000
Spain	*	100	200	700	1,800	3,000	4,400	6,400	10,200	14,000	16,400
Switzerland	*	100	400	700	700	600	400	300	300	300	200
United States	1,600	1,600	200	100	100	100	100	100	100	100	*
All other	200	200	700	1,100	1,300	1,400	1,200	1,300	1,800	1,800	1,700
Total	5,000	10,600	32,200	51,300	56,500	53,600	33,500	27,700	30,300	29,700	28,400

* Not available or less than 50; included in "All other."

SOURCES: *United Kingdom, 1974a*, vol. 2, p. 204; *1974b*, *1980b*, *1980c*. Data for 1979 are provisional.

Residence, Ethnicity, and Socioeconomic Status

Average income	Total abortion rate (TAR)	
	Black women	White women
Less than $1,500	1,480	—
$1,500-2,499	1,670	—
$2,500-3,499	1,980	600
$3,500-4,499	2,590	630
$4,500-5,499	—	660
$5,500-6,999	—	830
$7,000 and more	—	1,220

— = No observations.

In all countries for which information on the incidence of abortion by size of community is available, the level is higher in urban areas than in rural areas and sometimes much higher, especially in the larger cities.

Although it is common knowledge that in many countries with restrictive legislation, wealthy, well-educated, and well-connected women find it much easier to obtain legal abortions than women of low socioeconomic status, this differential is most amply documented for the United States in general (*Hall, 1965*) and for New York City in particular (*Erhardt, 1970*). Owing to the close association of ethnic minority status with poverty, black and other nonwhite women had lower abortion rates and, especially, lower abortion ratios than white women in the years preceding the liberalization of abortion laws. The ethnic differentials began to narrow during the 1960s, and, following the adoption of nonrestrictive abortion policies, the situation was reversed, with nonwhite women having higher abortion rates and ratios than white women.

While the current ethnic pattern of abortion in the United States is well documented, this is not the case in regard to the socioeconomic pattern. The experience of New York City during 1970/71 (*Tietze, 1973a*) revealed, for resident women, a substantially higher abortion ratio among nonprivate patients (389 per 1,000 known pregnancies) than among private patients (286 per 1,000); since the low-income population from which the nonprivate patients were drawn had a higher birth rate than the better-off women represented by the private patients, the corresponding difference in abortion rates between the two groups must have been greater than the difference in abortion ratios.

This observation appears confirmed by a later nationwide investigation undertaken by the Alan Guttmacher Institute. In this study, a much higher abortion rate was found among low-income women eligible for Medicaid payments than among ineligible women (Table 2).

Another study suggests, however, that the socioeconomic differential may actually reflect the ethnic differential, at least in New York City (see table above). Total abortion rates (TAR), based on age-specific rates for the period September 1970–August 1971, were much higher for black women (1,800 per 1,000) than for white women residing in areas with less than 5 percent of the population of Puerto Rican birth or parentage (710 per 1,000). Within each group (the black group and the non-Puerto Rican white group), however, the rates tended to increase with the average per capita income for the ethnic group in the health area in which the women resided (*Kramer, 1975*).

Within the non-Puerto Rican white population, the TAR was highest (1,140 per 1,000) in areas where fewer than 10 percent of all children attending elementary and secondary schools were enrolled in parochial schools, declining steadily to a minimum of 540 in areas with at least 60 percent of all children in parochial schools.

The socioeconomic and ethnic differentials in regard to the use of illegal abortion in the United States have not been adequately explored. The histories collected by Dr. Alfred C. Kinsey and his associates at the Institute for Sex Research during the 1940s revealed an inverse association of the abortion rate and no association of the abortion ratio with level of education (*Tietze, 1957*). However, the findings may reflect self-selection of respondents in that study.

Some data on the incidence of legal abortion are available for Aberdeen, Scotland, where relatively nonrestrictive abortion policies had been implemented for a number of years prior to the enactment of the British Abortion Act. In Aberdeen, the abortion rate and ratio for 1968–71 were not only higher than elsewhere in Scotland but also higher than in England and Wales. The following abortion ratios per 1,000 known pregnancies (see table below) prevailed during two successive periods, computed for single women by their own occupation and for married women by their husband's occupation (*Aitken-Swan, 1973*).

Marital status and occupation category	1963-68	1969-71
Single women		
Professional and student	537	625
Clerical and skilled manual	138	405
Semiskilled and unskilled	86	176
Married women		
All nonmanual	22	48
Skilled manual	28	63
Semiskilled	34	84
Unskilled	35	98

In both periods, abortion ratios were directly associated with socioeconomic status among single women and inversely associated among married women. The association was much stronger for single women.

In Korea, according to the house-to-house survey of 1971 (*Hong, 1976*), the percent of women reporting abortions, the mean number of abortions per woman, and the abortion ratio per 1,000 pregnancies all tended to increase with higher socioeconomic status, as indicated by education of wife and occupation of husband. The same association has been found in Turkey (*Tezcan, 1980*, p. 38).

In India, according to the report for 1976/77, about 60 percent of the women obtaining legal abortions resided in cities and towns, 36 percent had gone beyond the primary level of education, and 18 percent stated their family's annual income to be more than 4,800 rupees. Although comparable figures for all women are not readily available, there can be no doubt that urban women with above-average education and income were over-represented. Many rural women appear to be unaware of the legality of abortion or have found the service inaccessible or unacceptable.

Demographic Characteristics

Tables 4–11 present percent distributions, rates, and ratios derived from numbers of legal abortions reported to health authorities, by age of woman, parity, and marital status, for those geographic areas and periods for which data are available. Exceptions are: Japan, where age-specific rates and ratios are based on estimated numbers of legal abortions obtained by married women and reported distributions by age for all women; and the United States, where rates and ratios are based on total numbers of abortions ascertained by the Alan Guttmacher Institute and on distributions by age, parity, and marital status published by the Centers for Disease Control.

Age

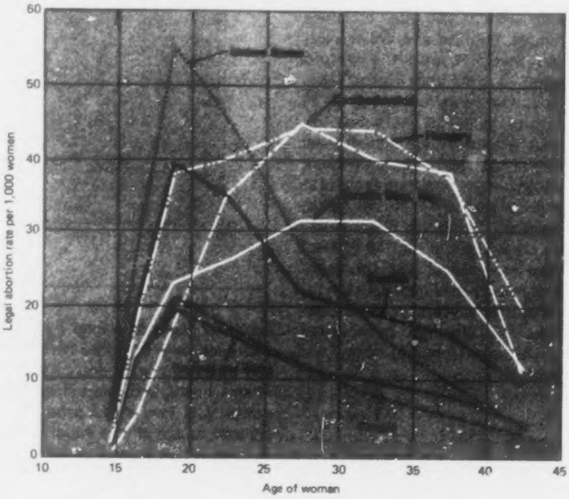
The percent distribution of legal abortions by age of woman at the time of the procedure shows that in the most recent years between 57 and 59 percent of all abortions in each of the areas in Table 4 were obtained by women aged 20–34. Underlying patterns of fecundity, sexual activity, family formation, and family building explain the concentration of abortions in this age span.

The proportion of women under age 20 among all women obtaining legal abortions increased in the majority of all areas over most of the period for which data are available, the highest proportions ranging in recent years from 25 percent to more than 30 percent in Norway, England and Wales, Scotland, New Zealand, Canada, and the United States. The lowest shares of such young women were reported from Tunisia and Japan. Iceland and Tunisia were the only countries in which the share of women aged 40 or older among those obtaining abortions exceeded 10 percent in any recent period.

As shown in Table 7, the share of women under age 15 among all women obtaining legal abortions in 1976–79 was 1.1 percent in the United States, 1.0 percent in Canada, 0.8 percent in England and Wales, 0.7 percent in Norway and Sweden, 0.5 percent in Denmark, and 0.2 percent in the German Federal Republic and in Finland, but only 0.1 percent or less in Czechoslovakia, the German Democratic Republic, and Hungary. Women aged 45 or older obtained 1.9 percent of all legal abortions in Tunisia, 1.1 percent in the German Federal Republic, 0.9 percent in Japan, 0.7 percent in Hungary, 0.6 percent in Denmark and Sweden, 0.5 percent in the German Democratic Republic, 0.4 percent in England, and 0.3 percent in Canada and Czechoslovakia. Although Japan and the United States publish statistics on only one of the two extreme age groups, it is virtually certain that in Japan the percentage of legal abortions obtained by the oldest group of women was higher than the percentage obtained by those under age 15 and that the opposite was true in the United States.

The percent distribution of aborted women by age reflects, to a certain extent, the age distribution of the female population within the reproductive age group; therefore, age-specific abortion rates present a clearer picture of the true age pattern of the incidence of abortion. As shown in Table 5, these rates were highest in all populations in all years for women in one of the age groups from 20 to 39 years, with the exception of England and Wales, Norway, Scotland, and Sweden, where the youngest group has the highest abortion rate in all or most recent years. A shift of the

FIGURE 6 Legal abortion rates per 1,000 women, by age of woman: Selected countries, recent years (1976–79)



peak rate from higher to lower ages has also taken place in other countries. The further breakdown of the youngest age group in Table 7 reveals a peak at 18–19 years, compared with either the preceding or the following age group, in Canada, Denmark, England and Wales, Finland, Norway, Sweden, and the United States, but not in Czechoslovakia, the German Democratic Republic, and Hungary, where the highest levels of the abortion rate are reached at 25–29 years of age. The patterns of age-specific abortion rates, illustrated in Figure 6, suggest major differences in sexual behavior among teenagers and major differences in contraceptive behavior among adult women.

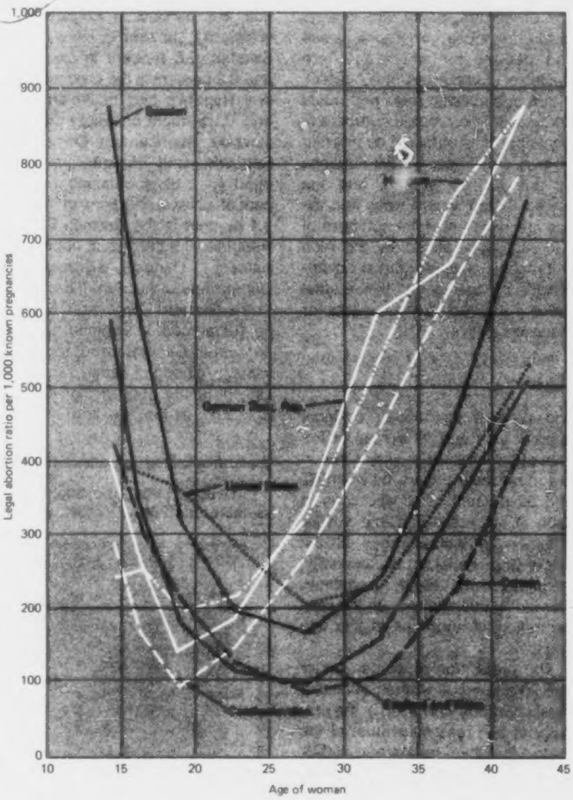
Age-specific abortion ratios per 1,000 known pregnancies, shown in Table 6, fall into two distinct patterns. In five countries (Czechoslovakia, the German Democratic Republic, Hungary, Japan, and Tunisia), the ratio increased at all times (with a few minor exceptions) from the youngest to the oldest age group, while in five other countries (Canada, England and Wales, Norway, Sweden, and the United States), a drop from higher levels among teenagers to a low at 20–24 years or at 25–29 years was followed by a steady rise to the highest levels at 40 years or more. Denmark and Finland moved from the first to the second pattern in the late 1960s, Singapore during the 1970s. A further breakdown of the "19 or less" group into younger and older teenagers reveals minimum abortion ratios at 18–19 years in Czechoslovakia, the German Democratic Republic, and Hungary (Table 7 and Figure 7).

Parity

The term "parity" as used in this fact book is somewhat ambiguous. Some countries report the distribution of legal abortions by prior deliveries, others by prior live births, still others by surviving children. Where infant and later childhood mortality is low, these procedural differences are of little importance.

As shown in Table 8, the percent distribution by parity reveals major differences among countries. In recent years, women without prior births were a majority among all women obtaining legal abortions in Canada, England and Wales, and the United States. Some of these women may have been pregnant before and may have terminated all prior pregnancies by abortion. Women with two children were more numerous than those with one or three in most countries, with the

FIGURE 7 Legal abortion ratios per 1,000 known pregnancies, by age of woman: Selected countries, recent years (1975–78)

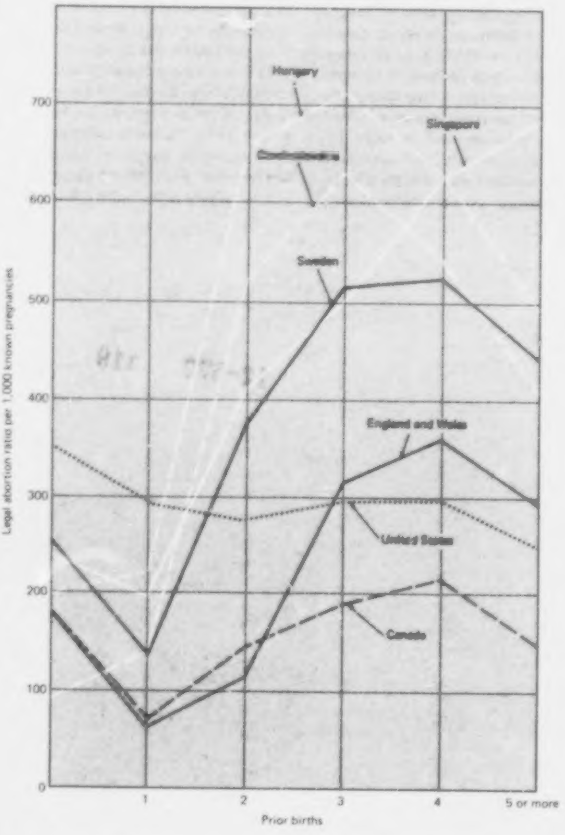


highest proportions reported from Czechoslovakia and Hungary. The share of high-parity women was substantial only in India and (especially) in Tunisia. In some countries, major shifts have taken place over the past few years. In Singapore, for instance, only 0.5 percent of the women obtaining legal abortions in 1970 were nulliparous, whereas 53 percent had experienced at least five births. By 1979, the proportion of nulliparous women had increased to 31 percent, while women with five or more prior births had dropped below 6 percent.

Parity-specific abortion ratios per 1,000 known pregnancies are shown in Table 9 and Figure 8. Three distinct patterns emerge. In the two eastern European countries for which data are available, the ratio increased to a high point and then declined. In Hungary, the maximum moved from parity 2 to parity 3 after restrictive legislation came into force in 1974; in Czechoslovakia it remained at parity 3 from 1965 through 1978. In the six countries of western Europe and North America shown in Table 9, the abortion ratio declined from a higher value among women with no prior births to a minimum among those with one prior birth, then climbed to a maximum at three or four prior births, after which it declined once more. In Singapore until 1974 the ratio increased steadily from women without prior births to those with five or more prior births. Since 1975 the ratio has been higher for nulliparous women than for those with one child; however, no drop has appeared among women with five or more prior births.

The decline in abortion ratios at higher parities in all European countries and in North America probably reflects a common factor: the long-established small-family norm. In each country, however, there are women who avoid abortion for religious or other reasons and who are, therefore, overrepresented among women of high parity. The number of prior births at which the abortion ratio is highest corresponds to the number of children beyond which additional births become unacceptable to a substantial proportion of women. In England and Wales, the drop at parity 5 and over appears first in 1970 and becomes marked in 1971. This may reflect the relatively restrictive abortion practices in earlier years, which made termination of preg-

FIGURE 8 Legal abortion ratios per 1,000 known pregnancies, by prior births: Selected countries, recent years (1977-78)



nancy more easily obtainable for women of high parity compared with those who had smaller families. In Singapore, the small-family norm is relatively new, and women of high parity, therefore, do not represent a group that rejects abortion.

The higher abortion ratios among childless women in the western countries (and now also in Singapore) reflect a high proportion of premaritally pregnant women. Married women rarely terminate their first pregnancies by induced abortion. It remains an open question whether the absence of an elevated abortion ratio at parity 0 in eastern Europe reflects a relative paucity of premarital pregnancies or whether such pregnancies are resolved by marriage. The very high abortion ratio for women with one prior birth in Hungary, especially before 1974, suggests widespread use of abortion as a method of child spacing rather than family limitation.

Marital Status

The distribution by marital status of women undergoing legal abortion also reveals major differences among the areas shown in Table 10. During the most recent years, the proportion of women obtaining abortions who were currently married was highest in India and lowest in the United States. Over the past few years the proportion of married women has declined in all countries except Czechoslovakia, Hungary, and (in 1978) the United States.

As shown in Table 11, the abortion ratio per 1,000 known pregnancies was substantially higher in all areas among currently unmarried women, including single, widowed, divorced, and separated women, compared with currently married women. Since the pregnancy of an unmarried woman can terminate in an out-of-wedlock birth, in an out-of-wedlock abortion, or within marriage, the total numbers of out-of-wedlock conceptions in three countries (Denmark, England and Wales, and Sweden) were estimated in order to correctly evaluate the role of abortion as an outcome of pregnancies occurring among unmarried women. The abortion ratios in terms of marital status at conception, based on the assumption that all infants born during the first eight months of marriage were premaritally conceived, were increased for the married and substantially reduced for the unmarried.

TABLE 4 Percent distribution of legal abortions by age of woman at termination:[1] Selected areas, years, and characteristics

Area, years, and characteristics	19 or less	20-24	25-29	30-34	35-39	40 or more
Canada						
1974	31.5	2[illegible].3	18.5	10.7	6.7	3.3
1975	31.3	29.1	19.5	10.6	6.5	3.0
1976	30.7	29.6	19.8	10.9	6.1	2.9
1977	30.8	30.3	19.4	11.2	5.8	2.5
1978	30.4	31.0	19.2	11.3	5.7	2.4
1979	30.5	31.5	19.3	11.3	5.4	2.0
Czechoslovakia						
1959-63	5.6	16.1	24.3	26.6	20.7	6.7
1964-68	7.0	23.1	23.7	22.0	17.2	7.0
1969-73	8.3	25.9	26.7	19.6	13.9	5.6
1974	7.8	24.4	28.1	21.0	13.1	5.6
1975	7.6	23.7	28.3	21.5	13.5	5.4
1976	6.9	23.7	28.7	22.3	13.2	5.2
1977	5.7	22.2	29.6	23.7	13.7	5.1
1978	5.6	22.4	29.3	24.5	13.6	4.6
1979	5.9	21.8	29.4	24.4	14.0	4.5
Denmark						
1963	8.3	20.0	24.0	21.0	16.2	10.5
1964	8.6	20.5	24.1	21.1	15.6	10.1
1965	8.2	20.7	23.6	20.0	17.0	10.5
1966	8.6	21.7	22.8	19.4	17.2	10.3
1967	13.1	20.6	19.3	19.0	17.5	10.5
1968	14.6	19.8	18.7	18.3	17.8	10.8
1969	16.6	19.3	19.3	17.8	16.5	10.5
1974	14.4	20.7	24.5	20.1	13.5	6.8
1975	16.2	21.3	23.1	20.2	13.0	6.2
1976	17.5	21.4	21.9	20.4	12.6	6.2
1977	18.0	21.6	20.6	20.9	13.0	5.9
1978	18.9	22.2	19.6	20.1	13.0	6.2
1979	18.3	22.9	19.7	19.4	13.4	6.3
England and Wales[2]						
1968	17.6	28.1	18.3	16.0	13.2	6.8
1969	19.0	26.5	18.5	16.4	13.1	6.5
1970	20.5	26.7	18.5	16.0	12.3	6.0
1971	22.1	26.4	18.6	15.3	11.9	5.7
1972	23.0	25.2	19.5	15.1	11.5	5.7
1973	24.4	24.6	19.6	14.7	11.2	5.5
1974	25.5	24.7	19.4	14.4	10.8	5.2
1975	26.5	24.0	19.4	14.4	10.5	5.2
1976	27.3	23.6	19.3	14.6	10.2	5.0
1977	27.9	23.8	18.1	15.0	10.1	5.1
1978	27.0	24.2	18.0	15.7	10.2	4.9
Type of service, 1978[2]						
NHS hospitals	26.8	21.0	18.0	16.5	11.4	6.3
Non-NHS premises	27.1	27.4	18.0	15.0	8.9	3.6
Finland						
1958-62	3.7	14.0	23.3	26.0	21.3	11.7
1963-67	7.3	17.8	21.9	22.2	19.0	11.8
1968	8.8	21.0	19.8	20.5	18.2	11.7
1969	9.5	21.3	18.9	18.9	17.1	14.3
1970	11.7	22.8	18.9	17.6	15.5	13.5
1973	15.1	25.6	21.6	13.7	13.3	10.7
1974	16.0	25.8	21.2	14.6	12.2	10.2
1975	19.2	24.7	22.3	12.9	11.4	9.5
1976	19.8	25.6	19.0	13.8	12.1	9.7
1977	20.8	24.7	19.2	14.8	11.3	9.2
1978	22.0	24.6	18.7	15.1	10.2	9.2
France						
1976	12.1	26.7	25.3	16.9	11.8	7.2
1977	12.2	26.6	24.7	18.1	11.4	7.0
German Democratic Republic						
1973	11.7	22.8	19.4	24.5	16.3	5.3
1974	12.3	22.2	17.6	24.1	17.8	6.0
1975	12.7	21.8	17.7	22.2	18.9	6.7
1976	13.5	20.5	19.2	19.4	19.9	7.5

TABLE 4 (continued)

Area, years, and characteristics	19 or less	20-24	25-29	30-34	35-39	40 or more
German Federal Republic						
1977	11.3	18.8	22.0	18.8	18.8	10.3
1978	13.0	20.7	22.2	18.3	16.2	9.6
1979	13.6	21.9	21.8	18.0	15.4	9.3
Hungary						
1957-61	5.1	22.4	29.0	24.0	15.2	4.3
1962-66	6.8	24.1	27.4	23.1	13.8	4.8
1967	7.4	25.3	27.2	22.0	13.7	4.4
1968	7.3	26.0	27.8	20.9	13.4	4.6
1969	8.3	25.5	27.8	20.8	13.2	4.4
1970	9.5	24.7	27.0	20.7	13.4	4.7
1971	9.0	25.8	24.7	20.4	14.2	5.9
1972	14.4[3]	26.7	23.3	19.0	12.6	4.0
1973	10.2	25.1	23.7	20.5	14.3	6.2
1974	11.0	22.9	20.6	20.1	17.1	8.3
1975	10.7	23.5	21.0	19.7	17.0	8.1
1976	10.3	23.8	21.7	19.5	16.7	8.0
1977	10.7	23.3	22.2	19.3	16.5	8.0
1978	10.8	21.9	22.9	20.0	16.6	7.8
1979	10.5	20.5	23.7	20.4	16.8	8.1
Iceland						
1976-78	20.1	23.7	16.8	16.6	12.1	10.7
India[4]						
1977/78	6.3	23.3	32.6	23.1	11.7	3.0
Japan						
1955-59	1.2	15.8	27.6	26.8	19.2	9.6
1960-64	1.4	16.1	28.8	27.0	18.3	8.4
1965-69	1.9	17.3	27.3	27.0	18.0	8.5
1970-74	1.9	19.4	25.6	25.7	18.8	8.8
1975	1.8	16.6	27.5	26.4	18.4	9.3
1976	2.0	16.3	28.7	25.5	18.3	9.2
1977	2.1	15.5	27.4	25.9	19.3	9.8
1978	2.5	15.3	25.9	27.2	19.5	9.6
New Zealand						
1978/79	30.2	22.0	18.3	13.8	9.9	5.8
1979/80	28.6	25.2	18.9	14.1	8.5	4.7
Norway						
1976	23.2	24.4	19.3	15.8	10.8	6.5
1977	24.6	24.1	18.1	16.2	10.7	6.3
1978	25.7	23.8	17.9	16.2	10.2	6.2
1979	25.5	24.4	18.4	16.1	9.9	5.7
Scotland						
1968	14.8	19.9	18.2	20.2	18.8	8.1
1969	17.3	22.0	16.9	19.4	16.4	8.0
1970	17.9	23.7	17.0	17.7	15.8	7.9
1971	19.8	22.7	17.5	16.8	15.3	7.9
1972	22.4	24.0	17.9	15.8	13.7	6.2
1973	24.9	24.0	18.2	13.6	12.7	6.6
1974	26.2	22.9	18.0	13.0	13.2	6.7
1975	27.6	23.2	17.7	13.1	12.6	5.8
1976	29.6	23.3	16.8	12.8	11.3	6.2
1977	29.1	24.7	16.9	13.3	10.0	6.0
1978	28.8	25.4	16.4	14.1	10.0	5.3
1979	27.4	26.2	16.2	14.4	10.4	5.4
Singapore						
1970	1.8	10.5	17.2	29.5	24.2	16.8
1971	2.9	12.5	19.0	29.7	22.3	13.6
1972	2.7	13.8	19.9	29.4	22.1	12.1
1973	3.5	17.6	23.7	25.3	18.8	11.1
1974	6.1	19.9	24.6	22.4	17.6	9.4
1975	8.3	25.0	25.5	18.6	14.2	8.4
1976	7.5	26.1	27.3	17.3	13.6	8.2
1977	8.1	27.6	27.5	17.9	11.9	7.0
1978	8.3	28.4	28.0	17.9	11.0	6.4
1979	8.2	29.9	27.4	18.7	9.8	6.0

TABLE 4 (continued)

Area, years, and characteristics	19 or less	20-24	25-29	30-34	35-39	40 or more
Sweden						
1956-60	9.2	13.2	20.7	23.2	21.6	12.1
1961-65	15.8	17.9	19.2	18.8	16.8	11.5
1966-70	21.3	23.0	18.0	15.5	13.6	8.6
1971	23.4	24.3	20.0	14.6	11.2	6.5
1972	23.5	24.3	21.3	14.5	10.9	5.5
1973	23.5	24.3	21.6	14.8	10.4	5.4
1974	24.5	23.0	21.9	15.4	10.2	5.0
1975	23.8	22.9	21.2	16.1	10.5	5.5
1976	22.9	22.6	20.3	17.6	11.0	5.6
1977	21.6	22.5	20.8	18.0	11.1	6.0
1978	19.6	21.9	19.8	19.6	12.8	6.3
1979	17.5	21.7	19.2	19.7	14.5	7.4
Tunisia						
1974	1.6	13.8	23.7	25.4	23.3	12.2
1975	1.7	15.0	24.8	24.4	23.2	10.9
1976	2.1	16.4	25.6	23.4	21.9	10.6
1977	1.8	16.6	25.0	25.1	21.0	10.5
1978	2.5	16.5	25.2	25.3	20.0	10.5
United States						
Reported to CDC						
1972	32.6	32.5	17.1	9.8	5.7	2.3
1973	32.7	32.0	17.7	9.9	5.5	2.2
1974	32.7	31.7	18.1	10.0	5.4	2.1
1975	33.1	31.9	18.3	9.7	5.0	2.0
1976	32.1	33.3	18.7	9.3	4.8	1.8
1977	30.8	34.5	18.7	9.5	4.7	1.9
1978	30.0	35.0	18.9	9.7	4.8	1.6
Estimated by AGI[5]						
1973	32.8	32.3	17.4	9.7	5.5	2.3
1974	32.5	31.9	18.1	10.0	5.4	2.1
1975	32.9	32.1	18.2	9.7	5.1	2.0
1976	32.1	33.3	18.7	9.3	4.8	1.8
1977	31.3	34.2	18.7	9.4	4.7	1.7
1978	30.8	34.7	18.9	9.5	4.6	1.5
Ethnic group (1978)[6]						
White	32.6	34.8	17.7	9.0	4.4	1.5
Black and other	26.8	34.4	21.5	10.7	5.1	1.5

NOTE: For sources see Table 2.

[1] Women of unknown age distributed *pro rata*.

[2] Residents only.

[3] This temporary rise has been interpreted as a response to a medical policy, subsequently abandoned, disallowing prescription of oral contraceptives for teenagers.

[4] Based on 52 percent of abortions reported from 15 states; 26 percent of all reported abortions.

[5] Adjusted for changes from year to year in the number of states reporting to CDC.

[6] Estimates generated by iterative adjustment of data for 29 states to marginal totals, based on *AGI, 1980c* and *United States, 1980b*.

TABLE 5 Legal abortion rates by age of woman at termination and total abortion rates: Selected areas, years, and characteristics
(Rates per 1,000 women)

Area, years, and characteristics	19 or less[1]	20-24	25-29	30-34	35-39	40 or more[2]	Total abortion rate
Canada							
1974	13.6	13.9	9.6	7.0	5.2	2.6	260
1975	13.7	13.6	9.9	6.8	5.0	2.4	257
1976	14.6	15.1	10.9	7.4	5.0	2.5	278
1977	15.3	15.9	11.1	7.5	4.9	2.4	286
1978	16.3	17.2	11.9	7.8	5.0	2.4	303
1979	16.8	17.9	12.1	7.8	4.8	2.1	308
Czechoslovakia							
1959-63	8.9	30.9	46.1	45.5	33.4	15.2	900
1964-68	9.9	37.5	46.8	43.0	30.5	11.6	896
1969-73	12.5	39.8	48.0	42.9	30.0	11.1	921
1974	11.0	32.3	39.8	36.3	26.8	10.2	782
1975	11.2	31.5	38.0	34.1	25.8	10.1	754
1976	10.8	32.0	39.2	36.7	26.4	10.2	776
1977	9.6	32.1	42.1	38.9	27.9	11.0	808
1978	10.0	34.3	43.3	40.1	27.4	10.5	828
1979	10.5	35.1	44.4	39.4	27.8	10.4	838
Denmark							
1963	1.6	4.8	6.6	6.0	4.3	2.6	130
1964	1.9	5.3	7.4	6.8	4.8	2.9	146
1965	2.1	5.8	8.2	7.4	6.1	3.4	165
1966	2.5	6.4	8.6	7.9	6.9	3.8	179
1967	4.4	6.4	7.8	8.5	7.9	4.4	197
1968	4.7	5.7	6.9	7.6	7.6	4.3	184
1969	6.6	6.9	8.2	8.9	8.7	5.3	223
1974	19.9	27.9	29.5	28.9	23.0	12.3	708
1975	25.1	32.5	31.9	30.8	24.3	12.5	786
1976	26.0	31.7	30.1	28.2	22.2	12.1	752
1977	25.5	30.4	28.0	26.5	21.4	10.8	713
1978	24.3	29.0	25.1	23.0	19.0	10.3	654
1979	22.5	29.3	24.8	21.9	18.1	10.0	633
England and Wales							
1969	5.6	6.9	5.9	5.5	4.5	2.1	152
1970	9.4	10.5	8.7	8.2	6.5	3.1	232
1971	12.5	13.2	10.7	10.0	8.0	3.6	290
1972	15.0	15.5	12.1	11.3	9.0	3.9	334
1973	16.2	15.9	12.1	11.3	8.9	4.3	344
1974	16.4	16.0	11.7	10.6	8.4	4.1	336
1975	16.2	15.4	11.2	10.1	7.9	4.0	324
1976	15.6	14.5	10.7	9.5	7.5	3.7	308
1977	15.7	14.7	10.6	9.1	7.4	3.9	307
1978	16.1	16.0	11.8	9.9	8.0	4.0	329
Finland							
1958-62	1.2	5.1	9.2	9.7	8.0	4.9	190
1963-67	1.6	5.2	7.4	8.1	6.5	4.1	164
1968	2.4	6.0	7.8	9.0	7.8	4.9	190
1969	3.9	7.6	9.6	10.5	9.8	7.3	244
1970	8.0	14.0	16.1	17.2	16.3	13.2	424
1973	17.4	28.4	25.4	21.6	22.4	17.6	664
1974	18.5	28.3	22.9	22.2	19.5	16.8	641
1975	21.2	26.0	22.0	17.6	17.1	15.0	594
1976	20.4	25.0	17.4	16.3	16.3	14.2	548
1977	19.6	22.0	16.1	14.5	13.7	12.2	489
1978	19.8	21.4	15.4	13.0	11.7	11.5	464
German Democratic Republic							
1973	19.6	42.4	48.4	41.4	30.0	11.4	966
1974	19.1	35.5	40.9	38.1	28.2	10.3	860
1975	17.3	29.9	34.5	33.6	25.5	11.3	760
1976	16.9	26.2	31.3	31.3	24.4	11.4	708
Hungary							
1957-61	21.2	96.0	118.5	93.5	60.2	24.1	2,068
1962-66	31.3	117.1	138.7	111.7	64.0	22.9	2,428
1967	33.2	128.1	143.1	117.1	68.8	21.4	2,558
1968	34.5	138.5	154.5	120.6	72.6	24.4	2,726
1969	39.2	137.6	156.3	123.8	74.7	24.0	2,778

TABLE 5 (continued)

Area, years, and characteristics	19 or less[1]	20-24	25-29	30-34	35-39	40 or more[2]	Total abortion rate
Hungary (cont.)							
1970	40.6	120.7	140.3	113.7	71.6	24.1	2,555
1971	37.1	118.6	127.0	109.4	75.1	29.6	2,484
1972	56.6[3]	114.8	113.9	96.3	64.5	19.4	2,328
1973	38.3	98.3	105.6	95.1	68.5	28.2	2,170
1974	26.6	52.5	54.6	55.8	50.1	22.9	1,312
1975	26.5	50.0	51.6	51.7	47.1	21.8	1,244
1976	26.6	48.5	49.8	50.0	44.8	21.1	1,204
1977	27.8	45.8	47.5	47.2	41.9	20.6	1,154
1978	27.3	41.8	45.0	45.0	39.0	19.1	1,086
1979	26.7	39.9	43.8	43.6	37.5	19.3	1,054
India							
1977/78	0.5	2.3	3.9	3.2	1.8	0.6	62
Japan[4]							
1955	8.0	102.4	191.9	226.3	192.4	111.5	4,162
1960	9.4	118.3	217.2	220.1	185.3	97.9	4,241
1965	8.1	100.3	181.6	182.3	126.4	76.0	3,374
1970	12.0	100.2	159.9	169.0	124.6	62.8	3,142
1975	10.3	82.2	116.0	129.4	98.2	51.3	2,437
Norway							
1976	22.8	24.2	19.0	17.5	15.5	10.0	545
1977	25.5	24.9	19.1	17.6	15.9	10.2	566
1978	25.4	23.3	18.1	16.0	13.8	9.5	530
1979	24.4	23.4	18.1	15.3	12.3	8.5	510
Scotland							
1969	3.2	3.9	3.7	4.6	3.8	1.8	105
1970	4.9	6.1	5.5	6.2	5.6	2.7	155
1971	6.5	7.0	6.6	7.1	6.6	3.2	185
1972	8.6	9.8	8.0	8.0	6.8	3.0	221
1973	9.3	9.9	7.8	6.8	6.3	3.2	216
1974	9.6	9.4	7.6	6.8	6.2	3.3	214
1975	9.7	9.2	7.1	6.3	6.1	2.8	206
1976	10.1	9.1	6.5	5.9	5.5	3.0	200
1977	9.9	9.6	6.8	5.8	4.9	3.0	200
1978	9.9	9.8	6.9	6.1	5.0	2.7	202
1979	22.7	27.5	23.0	20.7	18.3	11.4	618
Singapore							
1970	0.3	2.0	5.1	8.6	8.7	7.0	158
1971	0.8	3.8	9.6	14.0	13.0	9.1	252
1972	0.7	4.3	9.4	14.3	13.2	8.2	251
1973	1.4	8.2	15.3	18.6	16.5	11.3	356
1974	3.2	12.3	19.7	23.0	19.7	13.0	454
1975	7.6	26.9	32.8	36.3	27.2	19.9	754
1976	8.2	32.6	39.2	41.4	30.1	22.6	870
1977	9.5	35.0	41.1	40.5	27.7	19.9	868
1978	10.3	36.6	42.9	37.9	26.7	18.7	866
1979	10.1	37.0	40.3	35.6	23.9	16.2	816
Sweden							
1956-60	1.2	2.0	3.1	3.1	2.6	1.5	68
1961-65	2.2	2.9	3.5	3.4	2.8	1.7	82
1966-70	9.0	8.3	7.8	7.9	6.8	3.9	218
1971	16.8	14.8	12.3	11.7	9.8	5.4	354
1972	21.4	19.3	15.9	14.1	12.1	5.8	443
1973	23.2	21.6	17.1	14.8	12.2	6.3	476
1974	28.6	24.9	20.5	17.2	13.8	6.9	560
1975	29.7	27.9	21.3	18.0	14.7	8.2	599
1976	28.5	26.6	20.9	18.4	15.0	8.3	588
1977	26.2	25.8	21.4	17.5	14.1	8.7	568
1978	23.9	25.5	21.2	19.0	15.8	9.0	572
1979	22.7	27.5	23.0	20.7	18.3	11.4	618
Tunisia							
1977	1.2	12.9	26.6	36.0	30.9	15.8	617

TABLE 5 (continued)

Area, years, and characteristics	19 or less[1]	20-24	25-29	30-34	35-39	40 or more[2]	Total abortion rate
United States[5]							
1973	24.1	26.1	16.9	11.2	7.1	2.8	441
1974	28.6	30.6	19.9	13.1	8.3	3.2	518
1975	33.1	34.5	22.2	14.2	8.8	3.5	582
1976	36.3	40.3	24.7	15.3	9.3	3.7	648
1977	39.7	45.3	27.8	16.0	9.8	3.8	712
1978	41.9	48.3	[illegible]3.4	16.8	9.8	3.6	749
Ethnic group (1978)							
White	36.3	39.3	22.2	12.6	7.4	2.8	603
Black and other	71.6	98.4	71.6	43.2	24.9	8.2	1,590

NOTE: For sources see Table 2.

[1] Per 1,000 women 15-19.

[2] Per 1,000 women 40-44.

[3] See footnote 3 to Table 4.

[4] Rates based on numbers of abortions estimated by Muramatsu (*1978*) and age distributions reported by Ministry of Health and Welfare.

[5] Rates based on numbers of abortions reported to AGI and age distributions reported to CDC.

TABLE 6. Legal abortion ratios by age of woman at conception: Selected areas, years, and characteristics
(Ratios per 1,000 known pregnancies[1])

Area, years, and characteristics	19 or less	20-24	25-29	30-34	35-39	40 or more
Canada						
1975	221	106	76	104	212	374
1976	237	116	82	108	217	417
1977	254	124	83	109	220	430
Czechoslovakia						
1959-63	120	138	276	438	573	669
1964-68	140	178	298	461	599	697
1969	169	214	348	511	656	712
1970	171	203	326	490	662	739
1971	169	193	302	469	645	750
1972	159	167	272	434	627	737
1973	128	132	226	394	594	740
1974	124	139	234	395	597	751
1975	122	136	236	402	604	760
1976	119	141	245	413	605	771
1977	108	141	263	436	627	790
1978	113	149	271	452	635	795
Denmark						
1963	24	27	41	69	112	229
1964	28	30	47	80	126	259
1965	30	33	51	85	157	307
1966	35	37	56	95	186	357
1967	61	41	57	115	231	431
1968	71	41	53	111	245	465
1969	107	50	63	130	282	531
1974	311	169	192	332	578	801
1975	368	197	211	356	609	831
1976	405	209	215	357	602	829
1977	409	205	199	347	595	833
1978	417	202	181	321	565	835
England and Wales						
1969	73	44	35	81	124	208
1970	112	64	56	104	178	285
1971	153	85	72	135	231	351
1972	188	102	86	161	275	417
1973	214	110	91	169	306	457
1974	230	114	90	166	315	471
1975	246	115	91	162	320	487
1976	260	115	91	151	322	498
1977	267	116	87	141	314	513
Finland						
1958-62	26	32	59	93	126	171
1963-67	34	36	54	89	129	191
1968	49	49	69	120	194	287
1969	71	64	88	148	251	444
1973	307	218	202	307	527	767
1974	314	211	183	298	488	766
1975	334	189	167	229	434	739
1976	343	191	140	210	427	736
1977	352	179	132	189	381	707
German Democratic Republic						
1973	206	252	448	625	761	864
1974	197	220	399	621	769	871
1975	182	183	340	598	763	871
Hungary						
1957-61	248	389	543	657	732	771
1962-66	351	455	597	718	787	829
1967	334	446	571	704	793	834
1968	344	471	595	713	809	857
1969	370	470	603	721	817	858
1970	391	449	591	719	826	874
1971	361	443	573	715	830	889
1972	442[2]	434	541	690	806	841
1973	346	389	508	601	814	886

TABLE 6 (continued)

Area, years, and characteristics	19 or less	20-24	25-29	30-34	35-39	40 or more
Hungary (cont.)						
1974	224	225	306	502	737	852
1975	221	228	308	508	741	865
1976	217	228	318	522	744	865
1977	221	223	322	521	745	867
1978	220	214	321	533	747	872
Japan[3]						
1955	359	472	536	700	824	916
1960	429	514	568	760	906	958
1965	420	491	536	740	896	970
1970	426	472	465	694	884	966
1975	402	415	401	697	890	968
Norway						
1976	311	163	147	235	447	712
1977	356	175	147	240	462	728
1978	364	165	136	220	416	722
Singapore						
1970	8	15	25	63	120	227
1971	20	27	43	100	178	306
1972	22	38	44	106	193	308
1973	40	59	77	152	268	439
1974	95	94	108	209	357	541
1975	221	195	181	305	477	710
1976	243	229	214	321	523	771
1977	299	267	235	331	540	786
1978	320	278	237	310	537	780
Sweden						
1956-60	22	15	23	38	65	117
1961-65	35	20	24	40	74	153
1966	64	36	37	66	122	248
1967	98	49	50	91	173	353
1968	136	59	54	97	201	385
1969	174	78	71	127	249	416
1970	199	86	77	142	273	510
1971	239	105	91	160	308	530
1972	294	133	116	188	365	578
1973	318	147	125	195	377	623
1974	372	167	148	222	419	667
1975	433	192	160	230	434	699
1976	421	192	130	246	456	731
1977	426	196	164	239	435	742
1978	425	199	160	247	438	731
Tunisia						
1977	22	53	90	141	174	158
United States[4]						
1973	247	179	136	183	276	382
1974	282	204	157	210	319	432
1975	323	233	176	228	343	476
1976	345	257	190	225	353	497
1977	371	283	207	233	368	522
Ethnic group (1977)						
White	369	246	161	186	319	488
Black and other	378	408	395	420	512	608

NOTE: For sources see Table 2.

[1] Known pregnancies = Live births plus legal abortions.

[2] Rates based on numbers of abortions estimated by Muramatsu (*1973, 1978*) and age distributions reported by Ministry of Health and Welfare.

[3] See footnote 3 to Table 4.

[4] 1973-77: Ratios based on numbers of abortions reported to AGI and age distributions reported to CDC.

TABLE 7 Legal abortions obtained by women under 20 years of age: Selected areas, latest available year

		AGE OF WOMAN[1]		
Area	Year	14 years or less	15-17 years	18-19 years
A. Percent of abortions at all ages				
Canada	1978	1.0	13.7	15.7
Czechoslovakia	1979	0.1	1.9	3.9
Denmark	1978	0.5	8.6	9.8
England and Wales[2]	1978	0.8	13.5	12.7
Finland	1978	0.2	9.5	12.3
German Dem. Rep.	1976	0.1	6.4	7.0
German Fed. Rep.	1979	0.2	5.6	7.8
Hungary	1979	0.1	4.1	6.3
Norway	1979	0.7	12.5	12.3
Sweden	1979	0.7	8.0	8.8
United States	1978	1.1	12.0	17.7
B. Abortion rates per 1,000 women[3]				
Canada	1978	1.3	12.2	21.1
Czechoslovakia	1979	0.2	5.6	18.0
Denmark	1978	1.4	18.2	32.2
England and Wales[2]	1978	1.1	13.1	19.7
Finland	1978	0.4	14.1	27.9
German Dem. Rep.	1976	0.4	12.8	23.0
Hungary	1979	1.0	17.7	38.2
Norway	1979	1.5	19.9	29.6
Sweden	1979	2.0	16.9	29.5
United States	1978	3.9	27.5	59.3
C. Abortion ratios per 1,000 known pregnancies[4]				
Canada	1977	425	301	212
Czechoslovakia	1978	286	165	98
England and Wales[2]	1976	590	350	188
German Dem. Rep.	1975	413	262	144
Hungary	1978	245	256	200
Sweden	1978	872	583	318
United States	1977	402	379	363

1. Percent and rates: Age at termination. Ratios: Age at conception.

2. Residents only.

3. Rates for abortions at 14 years or less computed per 1,000 women aged 13-14 years.

4. Legal abortions plus live births six months later.

TABLE 8 Percent distribution of legal abortions by parity:[1] Selected areas and years

Area and years	0	1	2	3	4	5 or more
Canada[2]						
1974	58.0	14.4	14.4	7.4	3.3	2.5
1975	58.5	14.6	14.8	7.1	2.9	2.1
1976	58.9	15.3	15.0	6.5	2.5	1.8
1977	60.3	15.9	14.3	5.9	2.2	1.4
1978	61.2	16.1	14.2	5.6	1.9	1.0
1979	63.1	15.8	13.6	5.0	1.6	0.9
Czechoslovakia[3]						
1965-69	13.5	18.9	33.1	20.4	7.5	6.7
1970	15.6	21.9	35.4	17.2	5.5	4.4
1971	16.5	21.8	36.3	16.2	5.2	4.0
1972	17.0	21.4	37.2	16.1	4.9	3.4
1973	16.5	18.7	38.9	16.8	5.3	3.7
1974	15.5	17.7	40.9	17.5	5.0	3.4
1975	15.5	17.0	41.4	17.8	5.0	3.3
1976	13.9	16.8	42.9	18.4	5.0	3.0
1977	12.7	16.5	44.5	18.8	4.8	2.7
1978	11.6	15.8	46.1	19.5	4.5	2.5
1979	11.4	15.7	46.9	19.3	4.5	2.2
Denmark[2]						
1974	28.6	16.3	28.8	16.7	6.8	2.8
1975	31.1	16.3	28.1	16.2	5.9	2.4
1976	33.8	16.9	27.1	14.9	5.1	2.2
1977	34.8	17.0	27.6	14.0	4.6	2.0
1978	37.3	17.3	26.7	13.2	3.8	1.7
England and Wales[4,5]						
1968	46.5	10.6	15.2	12.3	7.6	7.8
1969	43.3	10.8	16.6	13.2	7.8	8.3
1970	44.1	10.9	17.1	13.3	7.7	6.9
1971	46.2	11.0	17.4	12.9	6.9	5.6
1972	46.6	11.6	17.9	12.7	6.4	4.8
1973	47.9	11.8	18.9	11.6	5.4	4.4
1974	49.0	12.2	18.7	11.5	5.2	3.4
1975	49.7	12.4	18.8	11.1	5.0	3.0
1976	50.6	12.5	18.9	10.7	4.6	2.7
1977	51.8	12.5	19.0	10.3	4.1	2.3
1978	52.1	13.0	19.1	9.9	3.8	2.1
Finland[2]						
1958-62	17.1	12.5	20.1	18.0	12.8	19.5
1963-67	27.8	12.7	19.6	16.5	10.4	13.1
1968	33.0	13.0	19.8	15.2	8.8	10.2
1969	31.6	13.2	20.1	15.6	9.5	10.0
1970	32.4	14.3	19.1	14.5	10.2	9.5
1973	41.0	16.0	20.5	11.8	6.1	4.6
1974	43.4	16.7	19.8	10.9	6.2	3.0
1975	45.9	16.3	21.3	9.1	5.0	2.4
1976	46.3	17.3	20.5	9.6	4.3	2.0
1977	47.2	17.8	19.5	9.3	4.1	2.1
1978	49.1	17.2	19.5	9.0	3.5	1.7
German Federal Republic[4]						
1977	34.6	17.6	23.9	13.1	5.9	4.9
1978	38.3	17.7	23.1	11.6	5.1	4.2
1979	42.8	17.1	21.9	10.4	4.4	3.4

TABLE 8 (continued)

Area and years	0	1	2	3	4	5 or more
Hungary[4]						
1959-62	13.0	28.5	31.3	27.2		
1963-66	15.6	30.4	31.2	22.8		
1967	16.0	32.2	32.0	19.8		
1968	15.7	33.8	31.9	11.0	7.6	
1969	16.7	34.1	31.5	17.7		
1970	17.1	33.3	33.0	16.6		
1971	18.6	32.8	33.1	9.1	6.4	
1972	19.5	32.5	33.2	8.8	6.0	
1973	19.8	30.4	33.7	9.6	6.5	
1974	24.2	23.1	33.5	11.6	7.6	
1975	24.2	21.9	35.1	11.8	7.0	
1976	23.4	21.4	35.9	12.4	3.8	3.1
1977	22.8	21.1	36.6	12.8	3.7	3.0
1978	21.9	21.1	37.4	13.0	3.7	2.9
1979	21.0	20.9	38.5	13.3	3.7	2.6
India[3, 6]						
1972-75	12.5	13.6	22.2	20.5	31.2	
1975/76	11.5	17.0	22.2	20.2	29.1	
1976/77	10.2	18.9	28.4	19.9	22.6	
Scotland[4]						
1968	30.1	9.0	15.7	15.7	12.6	16.9
1969	33.6	9.7	14.6	16.9	12.0	13.2
1970	35.6	9.1	15.4	16.3	11.7	11.9
1971	35.5	9.5	17.4	16.2	11.7	9.7
1972	37.2	10.9	17.8	16.2	9.4	8.5
1973	40.4	11.5	19.1	14.4	8.6	6.0
1974	40.8	11.8	20.4	14.6	7.5	4.9
1975	43.2	13.0	19.6	13.9	5.9	4.4
1976	46.6	13.2	18.6	12.0	5.9	3.7
1977	47.6	13.1	19.4	11.6	5.2	3.1
Singapore[3]						
1970	0.5	2.7	7.4	16.5	19.5	53.4
1971	0.5	3.2	9.9	19.1	18.0	49.3
1972	1.1	4.7	15.6	19.8	18.6	40.2
1973	4.2	10.6	21.8	20.2	14.8	28.4
1974	7.5	13.3	23.5	18.7	12.7	24.3
1975	20.5	14.4	23.1	15.4	9.8	16.8
1976	24.6	15.8	24.3	14.8	8.2	12.3
1977	26.5	17.8	25.9	13.5	6.9	9.4
1978	29.8	18.6	26.1	12.0	6.1	7.4
1979	30.8	19.1	26.7	12.5	5.3	5.6
Sweden[2]						
1968	35.9	15.8	20.5	14.7	7.9	5.2
1969	37.3	16.6	20.8	13.7	7.2	4.4
1970	38.6	16.8	20.7	13.9	5.2	3.8
1971	40.5	16.8	21.1	12.7	5.8	3.1
1972	41.3	17.3	21.5	12.4	4.9	2.6
1973	41.3	17.7	22.1	12.1	4.5	2.3
1974	43.0	17.1	22.0	11.3	4.8	1.8
1975	40.0	18.7	23.6	11.8	4.0	1.9
1976	40.1	18.2	24.7	11.8	3.6	1.6
1977	39.7	19.0	25.2	11.3	3.4	1.4
1978	40.7	18.3	25.2	11.4	3.1	1.3
1979	39.2	18.3	26.3	11.7	3.3	1.2

TABLE 8 (continued)

Area and years	0	1	2	3	4	5 or more
Tunisia[3]						
1974	5.6	6.4	11.2	12.6	16.3	47.9
1975	4.3	8.8	11.9	13.3	16.6	45.1
1976	5.4	9.9	13.8	13.9	17.0	40.0
1977	5.9	10.4	14.5	14.2	17.5	37.5
1978	7.1	10.4	15.2	14.7	16.9	35.7
United States[7]						
Reported to CDC						
1972	49.4	18.2	13.3	8.7	5.0	5.4
1973	48.6	18.8	14.2	8.7	4.8	4.9
1974	47.8	19.6	14.9	8.7	4.5	4.5
1975	47.1	20.2	15.5	8.7	4.3	4.2
1976	47.7	20.7	15.4	8.3	4.1	3.8
1977	53.4	19.1	14.3	7.0	3.3	2.9
1978	56.6	19.2	14.1	5.9	—— 4.2 ——	
Estimated by AGI[8]						
1973	55.2	15.4	13.9	8.1	3.9	3.5
1974	53.7	17.3	14.5	7.8	3.6	3.1
1975	52.4	18.8	15.1	7.5	3.3	2.9
1976	53.4	19.4	14.9	6.9	2.9	2.5
1977	56.4	18.9	14.2	6.1	2.5	1.9
1978	56.6	19.2	14.1	5.9	—— 4.2 ——	

NOTE: For sources not indicated see Table 2.

1. Women of unknown parity distributed *pro rata*.
2. Prior deliveries.
3. Surviving children.
4. Prior live births.
5. Residents only.
6. Based on 56 percent of all abortions reported in 1972/75, 68 percent in 1975/76, and 73 percent in 1976/77.
7. Definition of parity varies among the states.
8. Adjusted for changes from year to year in the number of states reporting to CDC.

TABLE 9 Legal abortion ratios by parity: Selected areas and years
(Ratios per 1,000 known pregnancies[1])

Area and years	0	1	2	3	4	5 or more
Canada						
1975	159	57	130	178	203	145
1976	168	63	140	186	207	162
1977	177	69	142	187	212	151
Czechoslovakia						
1965-69	112	199	550	655	580	470
1970	126	215	575	645	570	427
1971	127	195	557	622	556	411
1972	122	164	513	592	521	364
1976	92	115	476	588	527	395
1977	90	120	496	607	539	401
1978	88	138	513	627	541	408
Denmark						
1974	182	135	416	592	672	606
1975	220	152	452	633	688	620
1976	248	162	462	641	678	609
1977	247	155	465	629	681	619
England and Wales[2]						
1969	65	21	63	110	144	156
1970	97	31	97	167	217	214
1971	128	38	127	206	254	227
1972	153	47	163	257	304	264
1973	160	53	191	295	348	307
1974	167	55	201	306	353	298
1975	174	55	206	311	358	292
1976	176	57	207	313	357	289
Finland						
1963-67	42	30	83	132	155	141
1968	58	39	124	197	233	212
1969	71	53	171	276	345	307
1973	227	166	462	606	704	568
1974	228	158	432	576	694	469
1975	221	152	380	516	631	389
1976	217	130	373	508	584	334
1977	212	122	332	479	543	323
Hungary						
1959-62	246	528	759	728		
1963-66	297	567	815	753		
1967	282	539	819	740		
1968	292	567	833	812	680	
1969	308	574	837	756		
1970	305	559	840	746		
1971	305	531	828	783	644	
1972	311	522	818	778	638	
1973	303	461	775	759	634	
1974	221	234	618	666	536	
1975	219	223	632	677	545	
1975	212	223	642	695	628	484
1977	207	218	648	706	631	489
1978	197	217	656	711	628	494
Singapore						
1970	1	5	18	63	102	142
1971	1	9	38	117	165	221
1972	1	13	62	127	194	216
1973	13	44	136	208	271	294
1974	33	72	201	294	374	432
1975	145	127	309	425	533	598
1976	184	158	359	481	590	647
1977	213	191	405	504	620	671
1978	233	193	405	497	619	681
Sweden						
1976	235	135	389	552	583	505
1977	238	138	384	531	562	458
1978	249	136	368	510	520	442
United States[3]						
1973	240	106	191	235	236	184
1974	264	133	225	274	272	214
1975	291	163	257	297	296	249
1976	313	178	267	301	297	257
1977	348	190	274	297	298	246

NOTE: For sources, see Table 2

[1] Known pregnancies = Live births plus legal abortions

[2] Residents only

[3] Ratios based on numbers of abortions reported to AGI and parity distributions reported to CDC

TABLE 10 Percent distribution of legal abortions by marital status at termination:[1] Selected areas and years

Area and years	Currently married	Previously married	Never married
Canada[2]			
1974	32.2	9.6	58.2
1975	32.3	9.3	58.4
1976	31.7	9.9	58.4
1977	30.1	9.7	60.2
1978	28.4	10.2	61.4
1979	26.0	9.9	64.1
Czechoslovakia[3]			
1965-69	80.6	5.5	13.9
1970-74	77.4	6.6	17.0
1975	76.0	7.1	16.9
1976	77.8	7.0	15.2
1977	79.3	7.2	13.5
1978	80.1	7.3	12.6
1979	80.1	7.3	12.6
Denmark[3]			
1963	74.2	10.8	15.0
1964	74.3	11.1	14.6
1965	73.9	11.7	14.4
1966	70.0	12.0	18.0
1967	65.3	11.4	23.3
1968	62.6	11.6	25.8
1969	60.5	11.4	28.1
1974	57.9	8.1	34.0
1975	55.1	7.6	37.3
1976	52.5	7.2	40.3
1977	48.5	9.8	41.7
1978	45.4	10.0	44.6
England and Wales[2,4]			
1968	45.3	8.4	46.3
1969	46.2	8.9	44.9
1970	45.2	9.3	45.5
1971	44.0	9.1	46.9
1972	43.2	9.7	47.1
1973	42.4	9.7	47.9
1974	41.3	9.9	48.8
1975	40.6	10.1	49.3
1976	39.7	10.2	50.1
1977	38.8	10.4	50.8
1978	37.9	11.4	50.7
Finland[3]			
1976	39.5	11.0	49.5
1977	38.2	10.9	50.9
1978	35.5	11.5	53.0
France[3]			
1976	58.6	4.3	37.1
1977	57.8	4.4	37.8
German Federal Republic[3]			
1977	61.6	8.7	29.7
1978	58.9	7.2	33.9
1979	56.0	6.8	37.2
Hungary[3]			
1957-61	89.7	2.7	7.6
1962-66	86.7	3.0	10.3
1967	84.2	3.7	12.1
1968	84.1	3.7	12.2
1969	82.9	3.9	13.2
1970	82.0	4.0	14.0
1971	80.4	3.6	16.0
1972	79.2	3.6	17.2
1973	78.2	4.0	17.8
1974	70.2	6.8	23.0
1975	69.6	6.7	23.7
1976	69.7	7.0	23.3
1977	69.7	7.5	22.8
1978	70.2	7.7	22.1
1979	70.7	8.1	21.2
Iceland			
1976-78	43.7	11.5	44.8
India[2]			
1972-75	92.8	1.3	5.9
1975/76	93.1	1.1	5.6
1976/77	92.9	1.3	5.8
New Zealand[2]			
1978/79	33.0	16.0	51.0
1979/80	29.5	15.0	55.5
Norway			
1976	47.6	8.4	44.0
1977	45.6	8.0	46.4
1978	43.8	8.0	48.2
1979	42.6	7.1	50.3
Scotland[2]			
1968	56.8	10.5	32.7
1969	52.7	10.7	36.6
1970	51.5	10.8	37.7
1971	51.8	10.5	37.7
1972	48.7	10.9	40.4
1973	43.9	12.1	44.0
1974	44.6	12.1	43.3
1975	42.1	12.5	45.4
1976	40.0	12.1	47.9
1977	39.5	12.2	48.3
Singapore			
1970	94.3	1.1	4.5
1971	94.8	0.8	4.4
1972	93.5	1.0	5.5
1973	92.7	1.0	6.3
1974	88.4	1.1	10.5
1975	83.6	1.3	15.1
1976	81.2	0.8	18.0
1977	79.8	1.0	19.2
1978	77.4	1.1	21.5
1979	75.7	1.0	23.3
Sweden[2]			
1968	44.1	11.0	44.9
1969	44.0	10.3	45.7
1970	42.2	10.3	47.5
1971	40.9	10.1	49.0
1972	38.4	10.8	50.8
1973	37.0	11.3	51.7
1974[6]	35.8	10.5	53.7
United States[7]			
Reported to CDC			
1972	29.7	—— 70.3 ——	
1973	27.4	—— 72.6 ——	
1974	29.7	—— 70.3 ——	
1975	27.4	—— 72.6 ——	
1976	24.6	—— 75.4 ——	
1977	24.3	—— 75.7 ——	
1978	26.4	—— 73.6 ——	
Estimated by AGI[8]			
1973	29.0	—— 71.0 ——	
1974	27.6	—— 72.4 ——	
1975	26.3	—— 73.7 ——	
1976	24.6	—— 75.4 ——	
1977	22.8	—— 77.2 ——	
1978	24.9	—— 75.1 ——	

TABLE 10 (continued)

NOTE: For sources not indicated see Tables 2 and 8.

1. Women of unknown marital status distributed *pro rata*.
2. "Separated" included with previously married.
3. "Separated" included with currently married.
4. Residents only.
5. Based on 55 percent of all reported abortions in 1972/75, 75 percent in 1975/76, and 79 percent in 1976.77.
6. Reporting by marital status abandoned in 1975.
7. Adjusted for changes from year to year in the number of states reporting to CDC.

TABLE 11 Legal abortion ratios by marital status at termination (MS/T) and at conception (MS/C): Selected areas and years

(Ratios per 1,000 known pregnancies[1])

Area, years, and classification	Currently married	Currently unmarried
Canada (MS/T)		
1977	50	506
Czechoslovakia (MS/T)		
1965-69	265	603
1970	260	634
1971	242	640
1972	216	634
1976	196	582
1977	209	577
1978	220	571
Denmark		
(MS/T)		
1965	47	136
1966	49	160
1967	56	205
1968	55	217
1969	66	268
1974	201	416
1975	223	442
1976	230	449
1977	215	442
(MS/C)		
1965	57	57
1966	61	69
1967	71	91
1968	66	103
1969	77	142
1974	224	321
1975	233	354
1976	258	365
1977	241	365
England and Wales[2]		
(MS/T)		
1969	31	291
1970	45	385
1971	57	456
1972	68	505
1973	72	530
1974	73	537
1975	74	531
1976	72	537
(MS/C)		
1969	35	165
1970	49	231
1971	63	325
1972	74	346
1973	79	373
1974	79	390
1975	79	397
1976	77	411
Finland (MS/T)		
1976	117	622
1977	107	603
Hungary (MS/T)		
1957-61	492	652
1962-66	547	772
1967	518	793
1968	537	803
1969	539	812
1970	515	807
1971	511	814
1972	494	802
1973	461	791
1974	277	730
1975	274	734
1976	277	729
1977	277	720
1978	278	702
Norway		
1976	131	568
1977	136	585
1978	125	562
Scotland (MS/T)		
1969	21	200
1970	31	271
1971	39	304
1972	45	366
1973	48	387
1974	51	398
1975	48	403
Sweden		
(MS/T)		
1968	49	256
1969	64	292
1970	70	292
1971	83	301
(MS/C)		
1968	57	165
1969	71	209
1970	79	215
1971	94	232
United States (MS/T)		
1971	51	448
1972	58	504
1973[3]	70	570
1974	83	599
1975	96	623
1976	95	642
1977	98	660

1. Known pregnancies = Live births plus legal abortions.

2. Residents only.

3. 1973-77: Ratios based on numbers of abortions reported to AGI and marital status distribution reported to CDC.

Repeat Abortions

The issue of repeat abortion is a matter of special concern for those who feel that abortion is unacceptable as a primary method of fertility regulation and should be used only as a backup measure when contraception has failed. Others fear that even minor adverse effects on the health of the woman or on the outcome of later pregnancies would be cumulated by multiple abortion experiences.

Table 12 presents data derived from the routine abortion statistics of several countries and New York City. The numbers of prior induced abortions are obtained from women seeking a subsequent termination and are, therefore, subject to response error and, in some cases, deliberate denial or understatement. In England and Wales, the record of prior abortions is limited to those obtained under the Abortion Act of 1967; although authorities in other countries ask about prior induced abortions without qualification, it is believed that few women report abortions obtained in illegal settings.

In general, the percent of repeat abortions among all legal abortions increases with the level of the abortion rate per 1,000 women aged 15-44. In England and Wales and in Canada, where the abortion rates are low, a relatively high frequency of surgical sterilization concurrent with abortion (see Table 18) further reduces the risk of repeat abortion. Much higher proportions of repeat abortions were reported in the United States, notably New York City, in Singapore, and in Sweden. The percent of repeat abortions, especially of third and higher orders, has increased most rapidly in countries, such as the United States, where restrictive abortion laws and practices have only recently been replaced by relatively easy access to pregnancy termination. This rapid increase does not reflect a progressive change from contraception to abortion as the primary method of fertility regulation but rather, to a large degree, the fact that a growing number of women who have had a first legal abortion are at risk of having a repeat abortion. Table 13 illustrates this situation for the United States, 1974–78. In Hungary, on the other hand, where abortion on request became available in 1956, the number of women with abortion experience had become almost stabilized by the late 1960s at more than one-half of the female population of reproductive age. As a result, the proportion and distribution of repeat abortions had also become stabilized. The implementation of a more restrictive abortion law in January 1974 resulted in a modest decline in the share of repeat abortions to just one-half of the total number in 1979.

Table 13 also reveals much higher rates of repeat abortions, per 1,000 women at risk of experiencing them, than of first abortions at the same time. This finding should not be interpreted as evidence for a deterioration of contraceptive practice after the first abortion. Rather, the difference reflects the heterogeneity of the female population in regard to the need for and use of abortion as a method of fertility control. With and without contraception, the incidence of unintended pregnancies varies with age, parity, and marital status. Access to abortion services varies widely among localities and socioeconomic groups. In addition, attitudes and behavior range as a continuum from complete rejection of abortion under all circumstances, to acceptance of abortion in some situations (e.g., for termination of out-of-wedlock pregnancy or for family limitation, but not for child spacing within marriage), to acceptance of abortion of all unintended pregnancies. Other factors being equal, the difference between first-abortion rates and repeat-abortion rates increases with the degree of heterogeneity of the population with regard to abortion practices (*Tietze, 1978b*).

The age pattern of repeat abortions varies among the few areas for which data are available. In all countries the proportion is lowest in the youngest age group (19 years or less). In Hungary, the proportion of repeat abortions, especially of fourth and higher orders, increases with age to a maximum at 40 years and over. In England and Wales, New York City, and Sweden, on the other hand, the high point is reached earlier, suggesting either incomplete reporting among older women or, more likely, more frequent resort to abortion by the more recent cohorts of women.

Very detailed information on repeat induced abortions, including the interval since the most recent preceding abortion, is available for Hungary. Among the women who, in 1971, reported two successive induced abortions without an intervening pregnancy, almost one-half reported an interval of less than two years. The proportion of early repeat abortions declined very slowly to 45 percent in 1973 and more rapidly thereafter to about one-third in 1975, followed by a modest increase to 35 percent in 1977. These changes reflect the reduction in the overall number of abortions in Hungary.

Because the Danish statistical system permits record linkage of all abortions obtained by the same woman during a given period, documented information on repeat abortion is available from that country. In 1975–77 more than 7 percent of the women who had at least one abortion during the three-year period had more than one, including one-half of one percent who had three or more (*Denmark, 1979*). The proportion of repeaters was highest among women in their early 20s.

Very high percentages of repeaters have been found in a number of surveys in several countries, some of which are shown in Table 14. Many of the abortions reported in these surveys were obtained in illegal settings during periods when modern contraceptive methods were not available or not widely used. In interpreting the data, it should be noted that they cover the lifetime experience of the respondents up to the time of the interview, which for the older women meant a long period during which they were at risk of a repeat abortion.

TABLE 12 Percent distribution of legal abortions by number of prior induced abortions:[1] Selected areas, years, and characteristics

Area, years, and characteristics	0	1	2	3 or more
Canada				
1974	92.1	7.0	0.7	0.2
1975	91.2	7.8	0.8	0.2
1976	89.7	9.1	1.0	0.2
1977	88.4	10.1	1.2	0.3
1978	86.7	11.3	1.6	0.4
1979	85.7	12.2	1.7	0.4
Age (years), 1978				
19 or less	93.9	5.8	0.3	0.0
20-24	84.7	13.5	1.6	0.2
25-29	81.1	15.7	2.6	0.6
30-34	82.5	13.6	3.0	0.9
35 or more	86.9	9.6	2.4	1.1
England and Wales[2,3]				
1968	99.9	0.1		
1969	99.3	0.7		
1970	98.4	1.6		
1971	97.5	2.5		
1972	96.3	3.7		
1973	95.0	5.0		
1974	94.2	5.8		
1975	93.5	6.5		
1976	92.2	7.8		
1977	92.1	7.9		
1978	91.3	8.7		
Age (years), 1978				
19 or less	95.9	4.1		
20-24	89.3	10.7		
25-29	87.8	12.2		
30-39	90.3	9.7		
40 or more	93.2	6.8		
Marital status, 1978				
Never married	91.9	8.1		
Currently married	92.0	8.0		
Previously married	86.5	13.5		
Finland				
1976	82.1	15.5	2.1	0.3
1977	81.1	15.8	2.6	0.5
1978	80.0	16.7	2.6	0.7
France				
1976	91.9	6.4	1.1	0.6
1977	91.2	7.2	1.1	0.5
Hungary				
1971	42.3	25.8	14.6	17.3
1972	42.5	25.7	14.6	17.2
1973	42.4	25.8	14.7	17.1
1974	43.3	25.5	14.4	16.8
1975	45.6	25.5	13.4	15.5
1976	47.0	25.4	13.3	14.3
1977	47.9	25.8	12.8	13.5
1978	49.4	25.5	12.6	12.5
1979	50.0	25.9	12.3	11.8[4]
Hungary (cont.)				
Age (years), 1977				
19 or less	87.7	10.9	1.1	0.3
20-24	68.2	23.3	6.1	2.4
25-29	46.7	30.7	13.3	9.3
30-34	31.1	30.5	19.0	19.4
35-39	26.7	26.8	19.0	27.5
40 or more	23.4	25.5	18.4	32.7
Prior live births, 1977				
0	77.2	17.5	3.6	1.7
1	50.1	27.2	11.9	10.8
2	38.5	29.8	16.7	15.0
3	31.4	27.7	17.1	23.8
4	25.8	24.4	17.0	32.8
5 or more	23.5	22.0	17.7	36.8
Marital status, 1977				
Never married	76.7	17.2	3.9	2.2
Currently married	40.5	28.0	15.1	16.4
Previously married	30.1	30.6	18.3	21.0
Education, 1977				
Elementary	44.8	26.1	13.6	15.5
Secondary	54.8	25.1	10.9	9.2
Higher	54.6	26.8	11.0	7.6
Iceland				
1976-78	89.5	10.5		
New York City[2,5]				
1972	86.4	11.3	1.7	0.6
1973	82.2	14.6	2.4	0.8
1974	78.5	17.0	3.5	1.0
1975	71.6	21.4	5.2	1.8
1976	66.4	24.3	6.8	2.5
1977	62.0	26.5	8.1	3.4
1978	57.7	28.0	9.9	4.4
Age (years), 1978				
19 or less	75.0	20.6	3.6	0.8
20-24	56.0	30.4	10.0	3.6
25-29	50.9	30.5	12.6	6.0
30-34	50.6	29.4	13.0	7.0
35-39	51.5	27.6	13.0	7.9
40 or more	56.7	25.9	10.4	7.0
New Zealand				
1978/79	94.8	4.7	0.4	0.1
1979/80	94.1	5.5	0.3	0.1
Norway				
1979	78.9	17.6	3.5	
Singapore				
1976	87.3	12.3	0.3	0.1
1977	83.8	14.1	1.7	0.4
1978	79.5	16.9	2.8	0.8
1979	75.2	19.2	3.9	1.7

TABLE 12 (continued)

Area, years, and characteristics	0	1	2	3 or more
Sweden				
1975	81.2	15.3	2.6	0.9
1976	78.8	17.2	2.9	1.1
1977	77.5	18.0	3.4	1.1
1978	76.5	18.4	3.9	1.2
1979	74.8	19.5	4.1	1.6
Age (years), 1978				
19 or less	90.9	8.6	0.5	0.0
20-24	75.7	20.4	3.4	0.5
25-29	69.4	22.7	6.0	1.9
30-34	72.1	20.7	5.4	1.8
35 or more	74.6	19.2	4.3	1.9

Area, years, and characteristics	0	1	2	3 or more
United States				
States reporting to CDC[6]				
1974	86.8	11.3	1.5	0.4
1975	81.9	14.9	2.5	0.7
1976	79.9	16.6	2.6	0.9
1977	76.8	18.3	3.4	1.5
1978	70.8	22.1	5.3	1.8
Estimated by AGI[7]				
1974	84.8	12.5	1.9	0.8
1975	79.5	16.5	2.9	1.1
1976	77.3	18.1	3.4	1.2
1977	73.4	20.3	4.2	2.1
1978	70.5	22.4	5.1	2.0

NOTE: For sources not indicated see Table 2

1. Women with unknown number of prior abortions distributed *pro rata*. See also note 5.
2. Residents only.
3. Prior abortions under the 1967 Abortion Act.
4. Includes 5.8 percent with 3 prior induced abortions, 2.9 percent with 4, and 3.1 percent with 5 or more.
5. Women with unknown number of prior abortions assumed to have had none. 1972-74: *Pakter, 1975*; 1975-79: *Pakter, 1980*.
6. *United States, 1980b*.
7. Adjusted for changes from year to year in the number of states reporting to CDC. Includes also reports from New York City.

TABLE 13 First and repeat legal abortions: United States, 1974-78

Year	First abortions	Repeat abortions
A. Number of abortions		
1974	762,100	136,500
1975	822,100	212,100
1976	911,300	268,000
1977	963,720	349,980
1978	994,500	415,100
B. Women at risk (1,000s)		
1974	43,933	2,225
1975	44,023	3,016
1976	44,254	3,861
1977	44,314	4,787
1978	44,280	5,750
C. Rate per 1,000 women		
1974	17.3	61.3
1975	18.7	70.3
1976	20.6	69.4
1977	21.8	73.1
1978	22.5	72.2

SOURCE: *Tietze, 1978a*, updated. Note that the numbers of abortions and of women at risk differ slightly from those used in the source.

TABLE 14 Percent of women having repeat abortions after the first and second induced abortion: Survey data, selected areas, and ages at interview

Area and age (years)	After 1st abortion	After 2nd abortion
Chile (Santiago), 1962/63[1]		
15-49	67.7	69.7
Greece, 1966-67[2]		
20-49	45.2	49.9
Hungary, 1966[3]		
15-39	42.1	41.8
35-39	49.2	43.6
Hungary, 1977[3]		
15-39	36.7	33.1
35-39	44.6	40.0
Japan, 1971[4]		
20-49	44.5	31.6
35-49	49.5	34.2
Korea, Rep. of, 1974[5]		
15-49	47.3	50.9
35-49	55.5	54.9
United States, 1940-49[6]		
21 or more	38.6	47.8
36 or more	45.6	50.0

1. Working-class area; women of all marital statuses. *Requeña, 1965*

2. Currently married women. *Valaoras, 1969.*

3. Currently married women. *Hungary, 1979b.*

4. Currently married women. *Mainichi Newspapers, 1972.*

5. Ever-married women. *Korea, 1977.*

6. White women of all marital statuses; mostly urban and well educated. *Indiana University, 1973.*

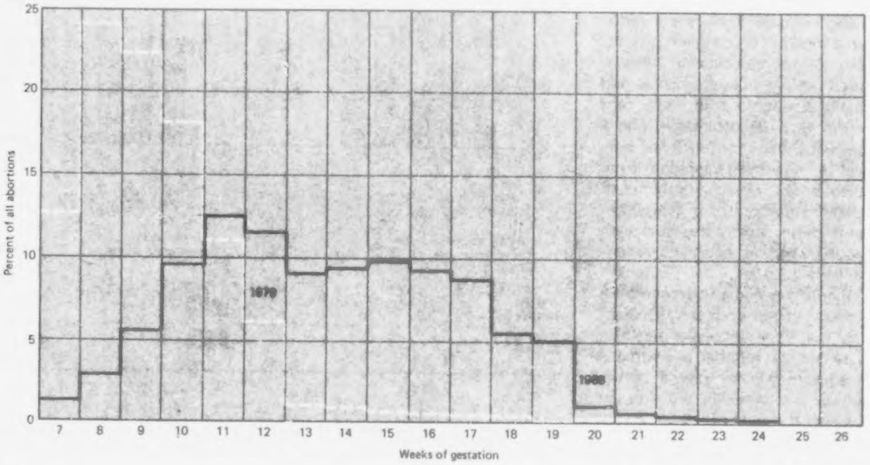
Period of Gestation

One of the most important factors in the evaluation of morbidity and mortality associated with abortion is the period of gestation at which the pregnancy is terminated. Although the traditional division has been that between abortions in the first trimester and those in the second trimester, that is, between those performed at 12 weeks from the onset of the last menstrual period (LMP)[1] or earlier and those at 13 weeks or later, accumulating experience, primarily in Great Britain and the United States, has made it clear that this dichotomy is not sufficient, because morbidity and mortality increase dramatically with the progress of gestation even within each trimester. Unfortunately, period of gestation is not uniformly reported in available statistics. In some countries (e.g., Great Britain), the form used for the notification of legal abortions includes an entry for the date of onset of the last menstrual period, and gestation is tabulated in terms of completed weeks. In other countries (e.g., Czechoslovakia), duration of pregnancy is reported by the physician in terms of weeks, which to him may mean ordinal week, nearest week, or completed week, corresponding for "12 weeks" to 77–83 days, 81–87 days, or 84–90 days, respectively. Hence, information on time trends and group differences within countries is more reliable than comparisons among countries.

Even when not prohibited by law, abortions are infrequently performed at more than 20 weeks of gestation, ranging from 0.2 percent of all legal abortions in Canada and 0.4 percent in Sweden to about 0.9 percent in the United States and the United Kingdom, according to the most recent available reports (1977–78).

Among the areas for which comparable statistics on legal abortions by period of gestation are available for recent years, the proportion of second-trimester abortions was highest in India, followed by Scotland, England and Wales, and Canada. India suffers from a general shortage of medical services, but it is certainly no mere coincidence that abortion services are less accessible in Britain and Canada than in most of the other western countries shown in Table 15. According to the Lane Report (*United Kingdom, 1974a*, Vol. 3, pp. 4 and 6), the average interval between a British woman's first contact with a physician and the performance of the

FIGURE 9 Percent distribution of legal abortions by weeks of gestation: Sweden, 1968 and 1979



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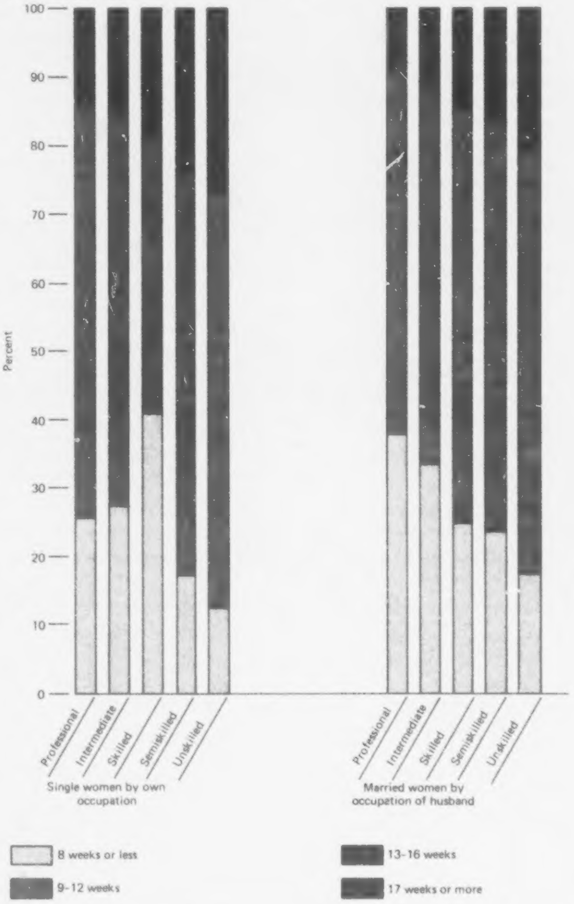
[1] A distinction must also be made between "menstrual weeks" (from LMP) and "gestational weeks" (from estimated date of conception, or two weeks less than menstrual weeks). In this fact book, the period of gestation is always stated in menstrual weeks from LMP.

operation was about four weeks, while in Canada, a few years later, it was eight weeks (*Canada, 1976*, p. 146). Second-trimester abortions occur less often in Sweden and Japan, where elective abortion is now permitted up to 18 and 24 weeks, respectively, and very rarely in Czechoslovakia, Hungary, and Yugoslavia, where, as elsewhere in eastern Europe, they are generally authorized only on medical indication.

A shift toward earlier abortion has occurred in almost all countries for which data are available for more than one year, most dramatically in Sweden, where the mean duration of pregnancy dropped from 14.1 weeks in 1968 to 9.9 weeks in 1979 (Figure 9). This trend probably reflects a growing awareness among women and physicians that abortion is less dangerous early in pregnancy than later on and, in some countries, the increasing availability of abortion services. Exceptions are Hungary and, to a lesser extent, Czechoslovakia, where legal and administrative changes appear to have resulted in some delays. The higher proportions of second-trimester procedures among nonresident women obtaining abortions in New York City in 1973–79, contrasting with a downward trend for residents, suggest a selective migration from other areas where first-trimester abortions (performed in clinics) became more rapidly available than second-trimester abortions requiring hospitalization.

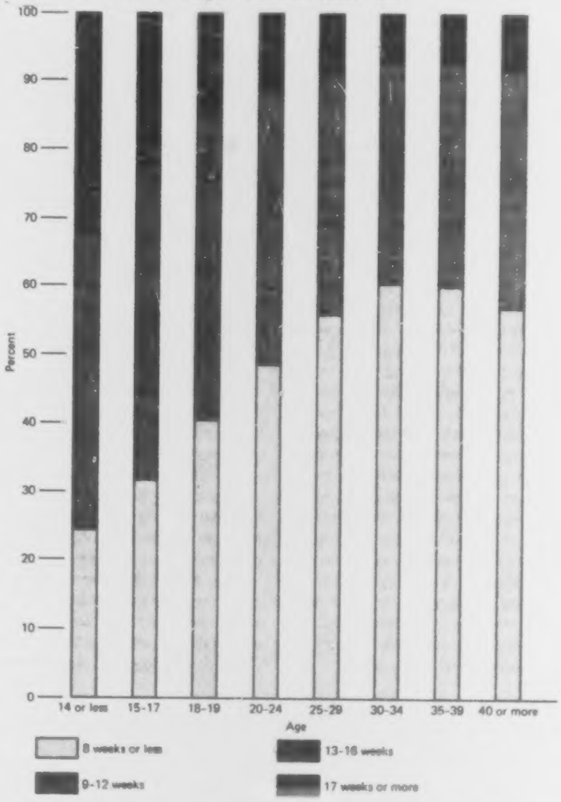
By shifting some abortions from January to the preceding December, the trend to earlier abortion increases the number of abortions in a given calendar year. A reduction by one week in the average duration of pregnancy generates an increase of almost 2 percent in the number of abortions.

FIGURE 10 Percent distribution of legal abortions by weeks of gestation and occupation of woman or husband: England and Wales, 1973



Late abortions occur most frequently among women of low socioeconomic status (Figure 10) and especially among the youngest women (Figure 11). The strong inverse association of period of gestation and woman's age probably reflects the inexperience of the very

FIGURE 11 Percent distribution of legal abortions by weeks of gestation and woman's age: New York State, 1977



young in recognizing the symptoms of pregnancy, their unwillingness to accept the reality of their situation, their ignorance about where to seek advice and help, and their hesitation to confide in adults. Economic considerations and, in many places, regulations prohibiting surgery on minors without parental consent also contribute to delays.

The slight declines in the proportions of abortions performed at eight weeks or earlier, combined with increases in second-trimester procedures, observed in most countries among older women, reflect primarily the association of high-order pregnancies with economic and cultural deprivation. Abortions on medical grounds are also more common among older women, and some women in their 40s may misinterpret the amenorrhea of pregnancy as the onset of menopause.

No information is available on the timing of illegal and self-induced abortions for any country. Survey data are not reliable sources of information, because a long time may have elapsed between the abortion and the interview; nor are hospital records to be depended on for such data, because the risk of complications requiring medical attention is higher after a late abortion than after an early one.

One category of second-trimester terminations deserves special mention: selective abortion to prevent the birth of infants with major physical or mental defects (*United States, 1979a*). In many cases, the presence of such a condition can now be determined in utero with certainty or near-certainty, most often by amniocentesis and cell culture, but also by such other methods as biochemical analysis of the amniotic fluid, ultrasonography, and, in some cases, direct visual inspection of the fetus (fetoscopy) and fetal blood sampling. Conditions that can be detected in utero include Down's syndrome (mongoloid idiocy), Tay-Sachs disease (amaurotic familial idiocy), neural tube defects (NTDs, primarily anencephaly and open spina bifida), and others. In addition, it is possible to identify the sex of the fetus. This permits the selective abortion of male fetuses, one-half of which would be affected by sex-linked disorders, such as hemophilia, if the pregnant woman is known to be a carrier.

Because all procedures for the prenatal detection of fetal abnormalities require highly trained health personnel and some may result in injury to the pregnant woman or a normal fetus, they are practically useful only if high-risk pregnancies can be identified. For many rare conditions, the only clues presently available are the prior birth of a defective child or such clinical signs as hydramnios, which is often associated with fetal malformation. However, carriers of some conditions, such as NTDs and Tay-Sachs disease, can be identified by screening tests. Screening for NTDs can be accomplished by a simple and inexpensive test of maternal blood serum. Tay-Sachs disease occurs most frequently among Jews of eastern European origin, one person in 30 being heterozygous for the condition and, therefore, a carrier of the disorder. Carrier matings have been successfully identified by community-sponsored blood tests (*Kaback, 1973*). In the case of sickle cell anemia, about one-tenth of all black persons in the United States are carriers and readily identifiable, but the methods used for the diagnosis of homozygous and, therefore, affected fetuses are still experimental and not ready for routine use. Because the incidence of Down's syndrome increases steeply with maternal age, it has been recommended that amniocentesis be offered to all pregnant women over age 35.

Prenatal diagnosis is rarely possible prior to 16 weeks of gestation, and in some cases a definitive determination may not be available before 22-24 weeks of gestation, at the borderline of fetal viability. The importance of such procedures lies in the fact that findings are negative in more than 95 percent of cases. Although it is never possible to guarantee a perfect baby, the prospective parents can at least be reassured that their child will not suffer from the disorder that had been suspected or feared. Prenatal diagnosis plus selective abortion thus make childbearing possible for couples who might otherwise refrain from procreation, perhaps by aborting all pregnancies.

At present, the number of abortions performed on the basis of prenatal diagnosis is quite small, even in developed countries, because the procedures have been in use only since 1968, most prospective parents and even some physicians are not aware of them, and comparatively few centers exist where they can be carried out. In the United States, about 125 prenatal diagnosis programs were active in 1978, but only 10 to 15 laboratories were adequately staffed and equipped for the diagnosis or exclusion of Tay-Sachs disease or NTDs. The number of diagnostic amniocenteses performed in 1978 was on the order of 15,000, compared with 150,000-200,000 pregnancies at risk under currently accepted criteria (*United States, 1979a*). The number of abortions performed on the basis of prenatal diagnosis was about 650 or one twentieth of one percent of all legal abortions in the United States. However, each of these abortions has averted a major catastrophe for a family.

Although damage to the fetus by exposure to rubella (German measles) during the early weeks of pregnancy cannot be determined by amniocentesis, the risk to the child to be born is great and is a significant ground for abortion, especially in times of epidemic. The numbers of abortions associated with rubella in the United States in 1964 is thought to have been around 3,500, dropping to about 1,000 in 1965 and to about 300 per year during 1966-68, by which time the epidemic had subsided (*Tietze, 1970*). Rubella was then not recognized by the laws of any state as a valid indication for abortion. In England and Wales almost 900 rubella-associated abortions were reported in 1978 (*United Kingdom, 1980a*).

TABLE 15 Percent distribution of legal abortions by weeks of gestation: Selected areas, years, and characteristics

Area, years, and characteristics	8 weeks or less	9-12 weeks	13-16 weeks	17 weeks or more
Canada[1]				
1974	20.8	58.0	14.6	6.6
1975	22.4	58.9	13.3	5.4
1976	24.1	59.0	11.8	5.1
1977	23.8	60.4	11.0	4.8
1978	24.7	59.9	11.1	4.3
1979	24.6	61.3	10.3	3.8
Age (years), 1978				
17 or less	16.1	59.1	17.2	7.6
18-19	19.4	60.6	14.0	6.0
20-24	23.4	61.6	11.0	4.0
25-29	29.9	59.2	8.2	2.7
30-34	32.3	58.5	7.2	2.0
35-39	33.3	57.5	6.9	2.3
40 or more	31.3	56.7	8.7	3.3
Czechoslovakia				
1968-72	63.2	36.3	0.4	0.1
1973	61.3	38.1	0.5	0.1
1974	58.3	41.2	0.4	0.1
1975	58.6	41.0	0.3	0.1
1976	58.5	41.0	0.4	0.1
1977	56.7	42.5	0.6	0.2
1978	56.6	42.9	0.4	0.1
1979	55.7	43.9	0.3	0.1
England and Wales				
Residents				
1968	12.7	49.3	27.2	10.8
1969	13.6	52.1	25.8	8.5
1970	13.6	57.7	23.1	5.6
1971	17.1	59.6	19.2	4.1
1972	18.7	60.9	17.2	3.2
1973	22.3	59.6	15.0	3.1
1974	23.7	59.1	14.2	3.0
1975	24.4	58.2	14.1	3.3
1976	25.7	57.8	13.3	3.2
1977	25.5	58.1	13.0	3.4
1978	24.7	58.4	13.1	3.8
Nonresidents				
1968	15.1	48.6	25.4	10.9
1969	15.9	46.0	26.2	11.9
1970	20.5	52.6	22.5	4.4
1971	26.0	52.3	18.0	3.6
1972	26.9	54.2	16.0	2.9
1973	26.6	50.7	18.4	4.3
1974	26.8	47.6	19.9	5.7
1975	24.9	46.6	20.1	8.4
1976	23.1	44.9	21.3	10.7
1977	22.4	45.6	21.0	11.0
1978	22.9	46.3	19.9	10.9
Age (years), 1978[1]				
14 or less	15.2	56.3	18.5	10.0
15-19	16.4	59.9	18.1	5.6
20-24	23.1	58.4	14.4	4.1
25-29	27.1	58.4	11.3	3.2
30-34	32.3	56.7	8.9	2.1
35-39	32.6	57.6	7.8	2.0
40 or more	28.4	58.0	10.1	3.5
Single women by own occupation, 1973[1]				
Professional	27.4	58.2	11.9	2.5
Intermediate	26.9	58.1	12.6	2.4
Skilled	19.9	61.0	15.8	3.3
Semiskilled	17.3	59.2	19.9	3.6
Unskilled	12.2	61.2	21.6	5.0
England and Wales (cont.)				
Married women by occupation of husband, 1973[1]				
Professional	37.9	53.2	7.5	1.4
Intermediate	33.8	55.9	8.9	1.4
Skilled	25.0	60.5	12.3	2.2
Semiskilled	23.7	60.1	13.8	2.4
Unskilled	17.3	62.3	17.4	3.0
Type of service, 1978[1]				
NHS hospitals	18.4	62.8	15.0	3.8
Non-NHS premises	30.7	54.2	11.2	3.9
Finland				
1976	30.2	58.3	10.0	1.5
1977	31.9	57.8	9.3	1.0
1978	33.4	57.0	8.5	1.1
France				
1976	53.4	45.0	1.4	0.2
Hungary				
1971	74.7	24.8	0.4	0.1
1972	75.9	23.6	0.4	0.1
1973	75.8	23.7	0.4	0.1
1974	71.4	27.6	0.7	0.3
1975	70.6	28.6	0.6	0.2
1976	69.7	29.6	0.5	0.2
1977	69.2	30.0	0.5	0.3
1978	68.9	30.2	0.6	0.3
1979	66.6	32.2	0.8	0.4
Age (years), 1977				
19 or less	60.2	36.5	2.2	1.1
20-24	68.1	31.4	0.3	0.2
25-29	70.2	29.3	0.3	0.2
30-34	71.3	28.2	0.3	0.2
35-39	72.5	27.2	0.2	0.1
40 or more	69.4	29.9	0.4	0.3
Education, 1977				
Elementary	67.7	31.5	0.5	0.3
Secondary	72.0	27.2	0.6	0.2
Higher	73.9	25.7	0.3	0.1
Iceland, 1976-78				
India[2]				
1972-75	—— 76.0 ——		—— 24.0 ——	
1975/76	—— 79.8 ——		—— 20.2 ——	
1976/77	—— 78.2 ——		—— 21.8 ——	
1977/78	—— 82.4 ——		—— 17.6 ——	
Karnataka State[3]				
1972	—— 79.4 ——		—— 20.6 ——	
1973	—— 83.3 ——		—— 16.7 ——	
1974	—— 85.3 ——		—— 14.7 ——	
Age (years), 1972-74				
19 or less	—— 58.1 ——		—— 41.9 ——	
20-24	—— 84.4 ——		—— 15.6 ——	
25-29	—— 89.2 ——		—— 10.8 ——	
30-34	—— 86.0 ——		—— 14.0 ——	
35 or more	—— 83.0 ——		—— 17.0 ——	
Japan[4]				
1951	—— 80.8 ——		—— 19.2 ——	
1952	—— 86.4 ——		—— 13.6 ——	
1953	—— 90.1 ——		—— 9.9 ——	
1954	—— 91.2 ——		—— 8.8 ——	
1955	—— 91.7 ——		—— 8.3 ——	
1956-60	—— 92.6 ——		—— 7.4 ——	
1961-65	—— 94.0 ——		—— 6.0 ——	

TABLE 15 (continued)

Area, years, and characteristics	8 weeks or less	9-12 weeks	13-16 weeks	17 weeks or more
Japan (cont.)				
1966-70	——95.0——		——5.0——	
1971-75	——96.5——		——3.5——	
1976	——95.9——		——4.1——	
1977	——95.8——		——4.2——	
1978	——95.5——		——4.5——	
Age (years), 1978				
19 or less	——79.4——		——20.6——	
20-24	——91.7——		——8.3——	
25-29	——95.7——		——4.3——	
30-34	——97.0——		——3.0——	
35-39	——97.2——		——2.8——	
40 or more	——96.7——		——3.3——	
New York City[5]				
Residents				
1971	——79.3——		——20.7——	
1972	——83.9——		——16.1——	
1973	——84.9——		——15.1——	
1974	——85.5——		——14.5——	
1975	——88.3——		——11.7——	
1976	——90.3——		——9.7——	
1977	——90.9——		——9.1——	
1978	——90.0——		——10.0——	
1979	——89.8——		——10.2——	
Nonresidents				
1971	——81.2——		——18.8——	
1972	——81.8——		——18.2——	
1973	——74.2——		——25.8——	
1974	——74.4——		——25.6——	
1975	——75.9——		——24.1——	
1976	——80.4——		——19.6——	
1977	——77.6——		——22.4——	
1978	——74.6——		——25.4——	
1979	——67.9——		——32.1——	
New York State[1,5,6]				
Age (years), 1977				
14 or less	24.5	43.0	15.9	16.6
15-17	31.9	46.3	11.1	10.7
18-19	40.6	44.2	8.4	6.8
20-24	48.9	39.9	6.7	4.5
25-29	56.1	35.5	5.0	3.4
30-34	60.4	32.6	4.4	2.6
35-39	60.0	33.1	4.3	2.6
40 or more	57.1	34.8	5.1	3.0
New Zealand				
1978/79	36.3	56.1	6.6	1.0
1979/80	39.7	52.8	6.6	0.9
Norway				
1979	40.3	56.5	2.6	0.6
Scotland				
1969	——65.0——		——35.0——	
1970	——72.0——		——28.0——	
1971	——74.4——		——25.6——	
1972	——79.1——		——20.9——	
1973	——80.8——		——19.2——	
1974	——83.1——		——16.9——	
1975	——82.0——		——18.0——	
1976	——82.2——		——17.8——	
Sweden				
1968	3.7	39.2	35.4	21.7
1969	4.5	46.2	31.8	17.5
1970	5.8	53.7	27.9	12.6
1971	6.1	61.3	23.3	9.3
1972	8.9	64.5	19.5	7.1
1973	10.0	70.3	14.9	4.8
1974	18.6	68.1	9.9	3.4
1975	36.2	56.8	5.3	1.7
1976	37.6	56.0	4.8	1.6
1977	40.7	53.3	4.3	1.7
1978	38.7	55.6	4.1	1.6
1979	37.1	57.4	4.0	1.5
Age (years), 1978				
17 or less	31.9	58.8	6.4	2.9
18-19	29.6	61.3	6.7	2.4
20-24	34.6	59.1	4.4	1.9
25-29	40.1	55.4	3.3	1.2
30-34	43.8	52.4	2.9	0.9
35-39	45.1	50.3	3.3	1.3
40 or more	44.1	50.5	3.8	1.6
United States				
Reported to CDC[7]				
1973	36.1	47.3	6.9	9.7
1974	42.6	44.1	5.5	7.8
1975	44.6	43.3	5.0	7.1
1976	47.0	42.4	4.5	6.1
1977	51.2	40.2	3.4	5.2
1978	52.2	39.2	4.0	4.6
Estimated by AGI[6,8]				
1973	38.2	47.3	8.0	6.5
1974	44.4	43.6	6.6	5.4
1975	46.5	42.7	6.0	4.8
1976	47.5	42.8	5.5	4.2
1977	50.0	41.1	5.2	3.7
1978	50.2	40.9	5.8	3.1
Age (years), 1978[9]				
19 or less	40.8	46.3	8.0	4.9
20-24	50.8	41.0	5.4	2.8
25-29	56.8	36.9	4.3	2.0
30-34	59.7	35.0	3.6	1.7
35 or more	59.0	34.6	4.2	2.2
Ethnic group, 1978[9]				
White	50.6	40.9	5.6	2.9
Black and other	49.4	40.8	6.2	3.6
Yugoslavia				
1969	——98.7——		0.8	0.5
Age (years)				
19 or less	——96.7——		1.9	1.4
20-24	——98.4——		1.0	0.6
25-29	——99.0——		0.6	0.4
30-34	——99.0——		0.6	0.4
35-39	——99.1——		0.6	0.3
40 or more	——98.6——		1.0	0.4

NOTE: For sources not indicated see Table 2.

1. Residents only.
2. Based on 54 percent of all reported abortions in 1972/75, 85 percent in 1975/76, 87 percent in 1976/77, and 74 percent in 1977/78.
3. *N.P. Rao, 1977.*
4. Gestation reported in months: three or less, four or more. In 1979 reporting was changed to weeks (7 or less, 8-11, 12-15, 16-19, 20 or more). The distribution is not comparable to those for earlier years and, therefore, not shown.
5. *New York State, 1979.*
6. Abortions at 16 weeks (A_{16}) were estimated by the following formula and transferred from the last to the next to last gestation category:

   $A_{16} = \sqrt{(4A_{13-16} \times 3A_{16+})}/12$

   $A_{13-16} = A_{13-15} + A_{16}$

   $A_{17+} = A_{16+} - A_{16}$
7. Midtrimester abortions reported as 13-15 weeks and 16 weeks or later.
8. Estimates based on the assumption that one-half of the difference between numbers of abortions reported to CDC and AGI were performed in nonhospital facilities. These abortions were distributed by weeks of gestation proportionally to all abortions at 12 weeks or earlier reported to CDC.
9. The distributions by age and gestation and by ethnic group and gestation were estimated by iterative adjustment of data for 31 and 26 states, respectively, to marginal totals, based on *AGI, 1980c* and *United States, 1980[illegible]*.

Abortion Procedures

The methods currently used by physicians for the termination of pregnancy can be conveniently discussed in three categories: (1) instrumental evacuation by the vaginal route, (2) uterine surgery, and (3) medical induction of labor.

Instrumental Evacuation

This is the method of choice for the termination of pregnancy in the first trimester, although it is often used in the second trimester as well. Although the classical method is customarily referred to as dilatation and curettage (D & C), the terms "surgical curettage" and "sharp curettage" are more specific. The procedure involves stretching the cervical canal by the insertion of a series of metal dilators, each slightly larger than the preceding one. When the canal has been sufficiently enlarged to permit the passage of instruments into the uterine cavity, the contents of the uterus are removed with a small ovum forceps, following which all remaining tissue is scraped out with a metal curette. The use of the ovum forceps may not be required in early pregnancy.

In recent years, surgical curettage has been progressively replaced by suction curettage, also known as vacuum aspiration (*GWUMC, 1973b, 1977*). This method was first described in China in 1958, became popular in the USSR and other countries of eastern Europe during the early 1960s, and was introduced into the United Kingdom and the United States in 1966. After dilatation of the cervix, a metal or plastic cannula, either open-ended or with a lateral opening near its end, is inserted into the uterus to dislodge the products of conception from the uterine wall. A recent modification of the cannula, developed by Harvey Karman (*1972a*), is used primarily during the early part of the first trimester. It is made of flexible rather than rigid plastic and has two lateral openings on opposite sides; the purpose of this design is to permit the tip of the cannula to bend if it is pushed against the wall of the uterus, thus reducing the risk of perforation. In the United States the flexible cannula is usually treated as a disposable item and discarded after a single procedure. However, it can be reused (*Laufe, 1977*). Because the plastic does not tolerate excessive heat, sterilization must be accomplished by immersion into a disinfectant solution. Even with proper care a flexible cannula can be used only 15-20 times. This limitation may create logistic problems in certain settings. The uterine contents are removed by a pump connected to the cannula by a flexible tube. The pump is usually driven by an electric motor, but hand-operated models are also available (*Williford, 1975*). During the first few weeks of gestation, the necessary vacuum may be produced manually by means of a 50 ml syringe. Many gynecologists complete the procedure with a metal curette to ensure that no tissue remains; others believe that doing so increases the risk of perforation. In general, suction is considered to be simpler, quicker, and less traumatic than surgical curettage. The average time required for the procedure is less than five minutes (*Andolšek, 1976*).

Both methods of instrumental evacuation are ordinarily performed under general anesthesia or under local anesthesia by paracervical block. With either procedure, the stretching of the cervical canal may also be accomplished by the insertion of a laminaria rod or "tent," for several hours, usually overnight. Laminaria is a marine plant, whose dried stems expand in the presence of moisture. Its use was quite accepted several decades ago but fell into disfavor because of concern that it might cause pelvic infection. Laminaria tents are currently receiving renewed attention because they can now be reliably sterilized and their slow action may reduce the incidence of injury to the cervix and, thereby, the risk of premature birth in subsequent pregnancies. The intravaginal application of prostaglandins for the purpose of "softening up" the cervix prior to dilatation is under investigation (*GWUMC, 1977*).

Menstrual regulation (MR)—also known as endometrial aspiration, interception of pregnancy, and minisuction—is a variant of suction curettage that is limited to the first two weeks after a missed menstrual period when pregnancy cannot yet be diagnosed reliably by either pelvic examination or conventional urine tests (*GWUMC, 1973a, 1974; Watson, 1977*). As a rule, neither anesthesia nor dilatation is required. A flexible Karman cannula with a diameter of 4-6 mm is used for the removal of the uterine contents. Failure to terminate the pregnancy occurs more frequently with MR than with suction procedures performed later in the first trimester. Moreover, many women who experience a delayed menstrual period are not pregnant (*Bongaarts, 1977; Fortney, 1977*). It can be argued that there is no sound medical reason to expose these women to the admittedly small risks associated with MR and that the procedure should be undertaken only after pregnancy has been established, at least in situations where abortion is legal. Valid psychological or social reasons may, of course, be present in individual cases.

In recent years, MR has become very popular in many developing countries, in legal, quasi-legal, and illegal settings. It has been estimated that at least 5 million procedures were performed during 1974–78 (*Laufe, 1979*). The legal aspects of MR have been discussed by Lee and Paxman (*1977*).

When instrumental evacuation is performed in the second trimester, it typically involves use of a small forceps for the dismemberment and removal of the fetus, of a suction cannula for the aspiration of amniotic fluid and of placental and fetal debris, and of a surgical curette to ensure complete evacuation. To minimize the risk of laceration, laminaria may be used to dilate the cervix. In the United States, these procedures are usually referred to as "dilatation and evacuation" or "D & E." In recent years, D & E has become an increasingly acceptable option for early second-trimester abortion, thus avoiding postponement of abortions sought at 13–15 weeks of gestation until 16 weeks, when medical induction can be performed safely. It has been estimated that universal adoption of D & E, in lieu of postponement, would reduce abortions at 16 weeks or later in the United States from more than 5 percent to about 2 percent (*Cates, 1979*). The procedure requires a high level of skill and care; it is also perceived as emotionally very stressful by many doctors performing it, as well as by other operating-room personnel. The psychological advantages to the patient are correspondingly great however, because she does not undergo labor (*Rooks, 1977*).

Uterine Surgery

The two major surgical procedures used for the termination of pregnancy are hysterotomy and hysterectomy. Hysterotomy is, in essence, a cesarean section before the fetus is viable. The uterus is usually approached by laparotomy; hysterotomy can also be done by the vaginal route early in the second trimester. Because the scar in the uterine wall is thought to weaken the tissue and to cause rupture of the uterus in later deliveries, many physicians believe that subsequent pregnancies carried to term will require cesarean section and that hysterotomy should be performed only if further pregnancies are not desired and the abortion can be combined with tubal sterilization.

Hysterectomy is a sterilizing procedure involving the removal of the uterus but not of the ovaries and, therefore, is not a castrating operation. Hysterectomy is most often chosen when the objective of the operation is the removal of the uterus because of fibroid tumors in addition to the termination of pregnancy. Some gynecologists recommend hysterectomy in lieu of tubal sterilization in order to avoid later complications in an organ they consider nonfunctional and therefore useless. Hysterectomy can be achieved by either the abdominal or the vaginal route. Both hysterotomy and hysterectomy are usually performed under general anesthesia.

Medical Induction

During the second trimester of pregnancy, abortion may be initiated by the stimulation of uterine contractions. In the United States, the most widely used procedure involves the replacement of amniotic fluid by a hypertonic solution of sodium chloride. The uterus is tapped by means of a needle and catheter through the abdominal wall, and a quantity of fluid, most often 200 ml, is withdrawn and replaced by an equal or large. amount of saline. The fetal heartbeat usually disappears within about one and a half hours. As a rule, labor starts within 24 hours after the instillation, and the expulsion of fetus and placenta is completed a few hours later. The average time from instillation to expulsion is around 36 hours and rarely more than 72 hours. The process can be accelerated by intravenous administration of oxytocin, but in some cases it is necessary to repeat the instillation. A hypertonic glucose solution has been used in lieu of saline but was abandoned because of the greater risk of infection. In recent years, the use of a solution of urea in lieu of sodium chloride has gained ground.

Uterine contractions can also be produced by the instillation, through an indwelling catheter, of small quantities of saline or of a solution of Rivanol (a yellow dye) between the fetal membranes and the uterine wall. While this route is rarely used in the United States, extra-amniotic saline has long been favored in Scandinavia. Because Rivanol has an antibacterial effect, it is thought to offer protection against pelvic infection. It is widely used in Japan. The extra-amniotic route can be used from 13 weeks of gestation onward; intra-amniotic instillation is difficult prior to 16 weeks.

In England, medicated pastes have been used for the induction of second-trimester abortions; because of a high complication rate and several fatalities, this method has been virtually abandoned.

The most recent addition to the methods available for the stimulation of uterine contractions is the use of prostaglandins (PGs)—compounds found in tissues of many species of animals, including man (*GWUMC, 1976; Johns Hopkins U., 1980a*). Although the first report on the action of PGs in human reproduction was published in 1930, they were not used to induce abortion until 40 years later. Originally two naturally occurring compounds were studied, PGE_2 and $PGF_{2\alpha}$, which are produced from seminal vesicles of sheep. More recently, these compounds have been synthesized and chemical analogs have been developed.

The first route of administration used was a prolonged intravenous drip; this has been abandoned because of unacceptable side effects. At present the most widely used technique, at least in the United States, is the intra-amniotic injection, without prior withdrawal of fluid, of 40 mg $PGF_{2\alpha}$, approved by the Food and Drug Administration in late 1973. More recently, vaginal inserts containing PGE_2 have also been approved. PGs have also been administered intra-amniotically in combination with oxytocin, laminaria tents, saline, urea, and Rivanol, and by extra-amniotic infusion by means of a catheter introduced through the cervix.

Other routes of administration of PGs currently under investigation include vaginal inserts for use early in the first trimester. So far, these inserts have not achieved a level of effectiveness that would make them seriously competitive with vacuum curettage. However, the development of an entirely medical, rather than surgical, method of early abortion that would be safe and effective for use in nonclincal settings, perhaps as a do-it-yourself procedure, remains an important objective.

The use of PGs for the preoperative treatment of the cervix, prior to mechanical dilatation, has already been mentioned in the section on instrumental evacuation.

Advantages of the PGs over saline include a shorter induction-to-abortion time, the absence of significant disturbances of blood clotting, and no risk of hypernatremia or myometrial necrosis. The major side effects, resulting from the action of PGs on the musculature of the gastrointestinal tract as well as on the uterus, are vomiting and diarrhea. Repeat procedures are more frequently required than with saline.

With the intra-amniotic instillation of prostaglandins and with all extra-amniotic methods, many fetuses show signs of life at expulsion but die shortly thereafter.

Still another technique for the stimulation of uterine contractions, which does not fall under the heading of medical induction, is the laminaria-metreurynter combination. Two or three laminaria tents are placed in the cervix for 24 hours, followed by the insertion of a small, empty, and tightly folded rubber bag between the membranes and the wall of the lower uterine segment. The bag is then filled with fluid to prevent its escape from the uterus before the cervix is sufficiently dilated, and a weight is attached to further increase its contraction-producing effect on the uterus. Infection is prevented by liberal use of antibiotics. The method is popular in Japan.

Methods for the induction of abortion used by persons without medical training range from spells and incantations, through a variety of traditional medications that tend to be ineffective and/or toxic, to grossly traumatizing procedures designed to damage or destroy the conceptus, leaving its expulsion to natural forces. The most widely used method is probably the insertion of a foreign body into the uterus. Twigs, roots, clothes hangers, rubber tubes (catheters), and other objects have been employed for this purpose. In Southeast Asia, abdominal massage is practiced by indigenous midwives (*Narkavonnakit, 1979; Sambhi, 1977*). Elsewhere, injections of soapy water or readily available household disinfectants are popular.

Statistics on Procedures

Statistics on abortion procedures, shown in Table 16, reveal both common trends and major differences among countries for which data are available. Some of the common trends, such as the increasing use of instrumental evacuation, reflect the worldwide shift from later to earlier abortion; others have resulted from greater experience with abortion, leading to the gradual abandonment of methods associated with high morbidity and mortality, such as uterine surgery, or reflect technological innovation.

The major example in the latter category is the progressive replacement of surgical curettage by suction curettage. In recent years the latter method accounted for 99 percent of all instrumental evacuation procedures in Sweden, for about 90 percent in Canada, Denmark, the United Kingdom, and the United States, and for 70 percent in the German Federal Republic. Surgical curettage predominates in at least some of the socialist countries of eastern Europe, such as Hungary (97.4 percent in 1977) and Poland (*WHO, 1979*), in India, and probably also in Japan and Korea. In China, on the other hand, suction curettage is said to be the preferred method.

The use of uterine surgery as a method of abortion has declined in all countries for which time series are available, especially in the United Kingdom; it appears to be still popular in India. Among all the countries shown in Table 16, uterine surgery is least often used in the United States (0.1 percent in 1978).

It is of interest to note that in recent years the great majority of abortions by uterine surgery performed in England and Wales and in Canada were hysterotomies, while in the German Federal Republic hysterotomies and hysterectomies were reported in approximately equal numbers. In the United States, the share of hysterectomies rose from about 45 percent in 1973 to almost 65 percent in 1978.

The share of medical inductions among all legal abortions has declined in Canada, the United States, and very markedly in Sweden, reflecting the trend toward earlier terminations; conversely it has increased in England and Wales, replacing uterine surgery. The ranking of saline, urea, and prostaglandin within the category of medical induction is quite different in different settings. Prostaglandin is the clear favorite in England's NHS hospitals, while hypertonic saline predominates in Canada and especially in the United States. The private sector in England uses all three methods with about equal frequency.

In Japan, the saline method was used for second trimester abortions in the early years after World War II, but was abandoned because of a high incidence of complications and mortality, reported as 200 deaths per 100,000 procedures (*Wagatsuma, 1965*). More recently, according to Japanese authors, about one-half of the relatively few second-trimester abortions have been initiated by the extraovular instillation of Rivanol and most of the remainder by the laminaria-metreurynter method (*Manabe, 1969, 1972*).

Table 17 shows the distribution of legal abortions by method used, within period of gestation, in four countries during recent years. A clear pattern emerges. Up to 12 weeks of gestation, instrumental evacuation (mainly suction curettage) was used for almost all abortions in all four countries. At 13–16 weeks this method still predominated in three of the countries, followed by medical induction, most often in the United States and least often in England. In Sweden, medical induction (by extraovular instillation) accounted for more than 70 percent of all abortions at this stage of pregnancy. At 17 or more weeks of gestation, medical induction led in all four countries, least so in England and Wales. Uterine surgery was used in a significant minority of abortions at 13 or more weeks of gestation in Sweden, less often in Canada and England, and rarely in the United States.

Legal abortions are performed in hospitals, clinics, and doctors' offices. The choice of premises and the duration of hospitalization, if any, are determined by the period of gestation and the type of procedure to be used, applicable laws and regulations, the local traditions and experience of the medical profession, availability of medical facilities, and economic considerations. Recent experience has shown that overnight hospitalization is usually not required for uncomplicated first-trimester abortions by suction. As shown in Table 2, about 53 percent of legal abortions in the United States in 1973 took place in hospitals and 47 percent in nonhospital facilities. By 1978, only 25 percent of all abortions were reported by hospitals and 75 percent by nonhospital facilities. (*Henshaw, 1981*). About one-third of all second-trimester abortions and perhaps two-thirds of early second-trimester abortions were performed in clinics. In addition, about one-half of all abortions in hospitals were performed on outpatients.

Steadily increasing percentages of outpatient abortions have also been reported in Sweden and Canada during the past several years:

Year	Sweden	Canada
1971	16.3	—
1972	24.7	—
1973	31.4	—
1974	47.2	32.8
1975	63.1	38.4
1976	68.7	41.2
1977	73.4	51.8
1978	74.3	57.2

The Canadian data exclude women undergoing concurrent surgical sterilization. In England and Wales, only 17 percent of resident women undergoing abortion without concurrent sterilization in NHS hospitals in 1978 were admitted and discharged on the same day, compared with 25 percent of those obtaining abortions in non-NHS premises (*United Kingdom, 1980c*). In many places, some doctors still insist on inpatient care, which may lead to delays and unnecessarily high proportions of second-trimester abortions. For example, in the German Federal Republic in 1979 almost 43 percent of all reported abortions were performed without overnight hospitalization, including 32 percent in the offices of gynecologists; however, the median duration of hospitalization of those admitted as inpatients to gynecological departments and aborted by suction curettage was almost five days, and 6 percent stayed for more than a week. A few doctors in the United States have permitted patients to go home after the instillation of hypertonic salt solution, to return to the hospital at the onset of labor (*Schulman, 1971*), but this practice has not been generally accepted.

An important characteristic of abortion facilities in the United States is their high degree of concentration. In 1978, 15 percent of providers of abortion services, with more than 1,000 abortions per year and an average of about 50 abortions per week per provider, accounted for 75 percent of all legal abortions in the United States (*Henshaw, 1981*). This concentration probably increases the experience and competence of the professionals involved and, thereby, the quality of the services. On the other hand, follow-up care is fragmented, with possible unfavorable effects on the patient (*Hodgson, 1975*).

TABLE 16 Percent distribution of lega. abortions by type of procedure: Selected areas and years

Area and years	Instrumental evacuation[1]	Uterine surgery[2]	Medical induction[3]	Other procedures
Canada				
1974	86.9	3.4	8.8	0.9
1975	89.2	2.3	7.5	1.0
1976	90.1	1.6	7.7	0.6
1977	91.3	1.1	6.8	0.8
1978	92.3	0.9	6.8	0.0
1979	93.6	0.6	5.8	0.0
Denmark				
1974	91.6	1.4[4]	2.1	4.9
1975	92.2	1.2	1.7	4.9
1976	95.2	0.9	1.8	2.1
1977	95.9	0.6	1.6	1.9
1978	96.3	0.5	1.7	1.5
England and Wales[5]				
1968	67.6	27.9	4.5	
1969	71.3	23.5	5.2	
1970	79.6	16.4	4.0	
1971	87.3	9.9	2.8	
1972	92.4	5.8	1.4	0.4
1973	92.9	3.7	3.2	0.2
1974	92.2	2.6	4.4	0.8
1975	91.4	1.9	6.5	0.1
1976	91.0	1.5	7.4	0.1
1977	91.3	1.2	7.5	0.0
1978	91.5	0.9	7.6	0.0
Residential status, 1978				
Residents	91.1	1.1	7.8	0.0
Nonresidents	93.1	0.1	6.8	0.0
Type of service, 1978[6]				
NHS hospitals	86.6	2.1	11.3	0.0
Non-NHS premises	95.3	0.2	4.5	0.0
France				
1976	98.6	1.4		
1977	98.9	1.1		
German Federal Republic				
1977	92.8	3.3	3.9	na
1978	93.7	1.9	4.4	na
1979	95.2	1.3	3.5	na
Hungary				
1974	99.5	0.5		
1975	99.5	0.5		
1976	99.6	0.4		
1977	99.5	0.5		
India				
Calcutta[7]				
1972-73	64.7	21.5[8]	13.8[9]	na
State of Karnataka[10]				
1972-74	76.0	10.8[8]	11.6[9]	1.6
State of West Bengal[11]				
1977-78	63.0	24.6	12.4	
Scotland				
1968	48.5	41.0[8]	10.5	
1969	57.6	30.5	11.9	
1970	65.4	24.7	9.9	
1971	68.3	21.2	10.5	
1972	75.6	14.1	10.3	
1973	78.3	8.6	13.1	
1974	79.0	5.8	15.2	
1975	77.4	3.1	19.5	
1976	80.6	2.9	16.5	
1977	82.1	2.6	15.3	
1978	85.1	1.1	13.8	
1979	82.2	1.6	16.2	
Sweden				
1971	64.1	7.6[12]	28.3[13]	na
1972	72.7	5.0	22.3	na
1973	80.4	3.6	16.0	na
1974	86.3	2.5	11.2	na
1975	91.2	1.7[14]	6.2	na
1976	91.7	1.6	6.7	na
1977	93.0	1.2	5.8	na
1978	93.6	1.2	5.2	na
United States				
Reported to CDC				
1973	88.4	0.7	10.9[15]	na
1974	89.7	0.6	9.7	na
1975	91.0	0.4	8.6	na
1976	92.8	0.2	7.0	na
1977	93.7	0.2	6.1	na
1978	94.6	0.1	5.3	na
Estimated by AGI[16]				
1973	89.7	0.6	9.7[15]	na
1974	90.5	0.6	8.9	na
1975	91.7	0.3	7.0	na
1976	93.4	0.2	6.4	na
1977	93.9	0.2	5.9	na
1978	95.0	0.1	4.9	na

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1. Suction and surgical curettage. Includes "menstrual regulation" and midtrimester "D & E" (dilatation and evacuation).
2. Hysterotomy and hysterectomy.
3. Hypertonic saline, urea, prostaglandin.
4. All years: Abdominal hysterotomy only.
5. Residents and nonresidents.
6. Residents only.
7. Two large hospitals. *Bose, 1980.*
8. All years. Hysterotomy only.
9. All years: Saline only.
10. *N.B. Rao, 1977.*
11. *Dutta, 1980.*
12. All years. "Other one-step methods."
13. All years: "Two-step methods."
14. 1975-78: Excludes first-trimester outpatient abortions by intravaginal prostaglandin. These cases (about 1 percent of all abortions) appear under "medical induction."
15. All years: Includes a small number of women aborted by "other procedures."
16. Estimates based on the assumption that one-half of the difference between numbers of abortions reported to CDC and AGI were performed in nonhospital facilities by suction curettage. Estimates also adjusted for changes from year to year in the number of states reporting to CDC. *Forrest, 1979; Henshaw, 1981.*

TABLE 17 Percent distribution of legal abortions by type of procedure, within period of gestation: Selected areas and years

Area, years, and weeks of gestation	Instrumental evacuation	Uterine surgery	Medical induction	Other procedures
Canada, 1978				
8 or less	99.5	0.4	0.1	0.0
9-12	98.9	0.5	0.6	0.0
13-16	72.3	3.2	24.4	0.1
17 or more	10.3	3.2	85.9	0.6
England and Wales, 1978[1]				
8 or less	98.9	0.2	0.9	0.0
9-12	97.2	0.7	2.1	0.0
13-16	77.7	2.2	20.1	0.0
17 or more	39.7	2.7	57.5	0.1
Sweden, 1976-78[2]				
8 or less	96.9	0.6	2.5	na
9-12	98.3	0.7	1.0	na
13-16	20.7	8.4	70.9	na
17 or more	2.6	25.1	72.3	na
United States, 1978[3]				
8 or less	99.3	0.1	0.6	na
9-12	98.8	0.1	1.1	na
13-16	77.7	0.2	22.1	na
17 or more	13.2	0.3	86.5	na

1. Residents and nonresidents.

2. "Uterine surgery" includes all cases reported as "other one-step methods," except early first-trimester abortions by intravaginal prostaglandin so reported from three locations. These cases have been combined with "two-step methods" as "medical induction."

3. Based on reports from 32 states adjusted to marginal totals. Medical inductions include a small number of "other procedures." Abortions at 16 weeks (A_{16}) were estimated by formula and transferred from the "16 weeks or more" category (A_{16+}) to "13-15 weeks."

$$A_{16} = \sqrt{(4A_{13-15} \times 3A_{16+})}/12$$

$$A_{13-16} = A_{13-15} + A_{16}$$

$$A_{17+} = A_{16+} - A_{16}$$

Sterilization

When an abortion is performed because the pregnant woman suffers from a permanent physical, mental, or genetic impairment, or because she desires no further children, the abortion may be combined with surgical sterilization. The latter can be accomplished either by hysterectomy or by the cutting, tying, crushing, cauterization, closure by metal or plastic clip, or partial resection of the fallopian tubes. The tubes can be reached through the abdominal wall or through the vaginal vault. The traditional approach is by laparotomy, that is, through an incision in the abdominal wall. A variant of this procedure, known as minilaparotomy, requires only a very small incision. Another recently developed procedure is laparoscopy, which permits access to the abdominal cavity by means of special instruments through one or two small incisions. Tubal sterilization by the vaginal route can be accomplished either without special instruments by posterior colpotomy or through a smaller incision by culdoscopy.

Among the areas for which statistical information is shown in Table 18, legal abortion was most frequently combined with sterilizing operations in India, followed in descending order of frequency by Scotland, Canada, England and Wales, Singapore, the United States, Finland, and Sweden, according to data for the most recent period. Legal abortions are rarely combined with sterilization in eastern Europe and Japan. The high prevalence of sterilization in India is associated with high percentages of older women, married women, and women of high parity among those obtaining legal abortions, whereas the low prevalence of sterilization in the United States and Sweden is associated with high percentages of young and single women pregnant for the first time. In Great Britain, however, the prevalence of sterilization has been high, although the distribution of women obtaining abortions by age, marital status, and parity is similar to that in the United States and Sweden; while in the countries of eastern Europe and in Japan, the low prevalence of sterilization is associated with high percentages of older, married, and parous women.

In recent years, the proportions of legal abortions combined with sterilizing procedures have declined in all countries included in Table 18; in some of them the change has been dramatic. Because the total numbers of abortions have increased during most of the period for which data on sterilization are available, the downward trend is less marked or even absent when the frequency of combined procedures is expressed as a rate per 1,000 women of reproductive age.

In general, concurrent sterilization is rare among young women, single women, nulliparous women, women of high socioeconomic status, and those without preexisting medical complications. Conversely, the combination of abortion and sterilization is frequent among older women, married women, women of high parity and/or low socioeconomic status, and among women with preexisting medical complications. To a considerable extent, the higher prevalence of concurrent sterilization among women of low socioeconomic status reflects their greater age and higher parity (*Lewit, 1973*).

TABLE 18 Percent of legal abortions with concurrent sterilization and rates per 1,000 women aged 15-44: Selected areas, years, and characteristics

Area, years, and characteristics	Percent of abortions	Rate per 1,000 women
Canada		
1974	12.3	1.2
1975	11.3	1.1
1976	10.2	1.0
1977	9.4	1.0
1978	9.0	1.0
1979	8.0[1]	0.9
Age (years), 1978		
19 or less	0.2	0.0
20-24	2.4	0.4
25-29	10.2	1.2
30-34	23.3	1.8
35-39	42.0	2.1
40 or more	49.0	1.2
Marital status, 1978		
Never married	1.2	—
Currently married	24.0	—
Previously married	15.0	—
Prior births, 1978		
None	1.0	—
1	7.4	—
2	25.9	—
3	37.6	—
4 or more	48.0	—
Gestation, 1978		
12 weeks or less	9.3	—
13 weeks or more	7.0	—
Procedure, 1978		
Medical induction	1.5	—
Instrumental evacuation	8.8	—
Uterine surgery	86.3	—
England and Wales[2]		
1968	23.0	0.8
1969	22.3	1.2
1970	18.4	1.5
1971	15.3	1.5
1972	12.4	1.4
1973	10.8	1.3
1974	9.8	1.1
1975	8.6	1.0
1976	8.7	0.9
1977	8.6	1.0
1978	8.2[3]	—
Age (years), 1978		
19 or less	0.1	0.0
20-24	1.3	0.2
25-29	7.5	0.9
30-34	15.9	1.6
35-39	24.5	2.0
40 or more	31.0	1.2
Prior births, 1978[4]		
None	0.5	—
1	5.4	—
2	16.3	—
3	23.7	—
4	29.6	—
5	33.6	—
6 or more	35.4	—
Marital status, 1978		
Never married	0.4	—
Currently married	18.4	—
Previously married	8.7	—
England and Wales (cont.)		
Married women by husbands' occupation, 1973		
Professional	13.3	—
Intermediate	15.6	—
Skilled	20.1	—
Semiskilled	22.8	—
Unskilled	29.9	—
Gestation, 1978		
12 weeks or less	8.4	—
13 weeks or more	6.9	—
Procedure, 1978		
Medical induction	3.7	—
Instrumental evacuation	7.7	—
Uterine surgery	75.1	—
Type of service, 1978		
NHS hospitals	14.5	—
Non-NHS premises	2.1	—
Finland[5]		
1965	30.5	1.5
1966	31.4	1.6
1967	32.0	1.7
1968	30.5	1.8
1969	33.2	2.6
1970	20.3	2.8
1971	9.1	1.7
1972	5.7	1.2
1973	4.4	1.0
1974	2.6	0.6
1975	3.0	0.6
1976	2.5	0.5
1977	2.1	0.4
1978	1.9	0.3
India[6]		
1972-75	49.7	0.2
1975/76	36.8	0.6
1976/77	44.4	0.9
1977/78	24.9	0.4
Scotland		
1969	31.2	1.1
1970	27.1	1.4
1971	28.3	1.8
1972	23.9	1.8
1973	20.5	1.5
1974	18.8	1.4
1975	14.2	1.0
1976	13.7	0.9
1977	13.7	0.9
Prior births, 1977		
None	0.7	—
1	6.1	—
2	25.0	—
3	34.7	—
4	41.8	—
5 or more	47.8	—
Singapore		
1973	39.1	4.1
1974	28.1	3.8
1975	15.3	3.6
1976	11.9	3.3
1977	7.7	2.2
1978	5.5	1.6
1979	5.1	1.4

TABLE 18 (continued)

Area, years, and characteristics	Percent of abortions	Rate per 1,000 women
Sweden		
1968	9.0	0.6
1969	7.7	0.7
1970	6.9	0.7
1971	5.0	0.6
1972	3.7	0.6
1973	2.4	0.4
1974	1.6	0.3
United States		
1970[7]	4.4	0.2
1971	2.9	0.3
1972	2.7	0.3
1973	2.5	0.4
1974	2.2	0.4
1975	2.4	0.5
1970/71[8]	3.7	0.3
Age (years)		
19 or less	0.2	—
20-29	2.6	—
30-39	11.2	—
40 or more	15.7	—
Prior births		
None	0.2	—
1	1.2	—
2	4.9	—
3	9.6	—
4 or more	19.0	—
Marital status		
Never married	0.8	—
Currently married	7.7	—
Previously married	6.8	—
United States (cont.)		
Ethnic group		
White	3.1	—
Black and other[9]	5.3	—
Preexisting medical complications		
With complications	15.8	—
Without complications	3.2	—
Women without preexisting complications by ethnic group and prior births		
White		
None	0.1	—
1 or 2	2.7	—
3 or more	11.4	—
Black and other[9]		
None	0.1	—
1 or 2	2.3	—
3 or more	15.0	—
Gestation		
12 weeks or less	2.7	—
13 weeks or more	6.5	—
Procedure		
Medical induction	0.8	—
Instrumental evacuation	1.7	—
Uterine surgery	93.0	—
1971/75[10]	2.9	—

NOTE: For sources not indicated see Table 2.

1. Including 0.2 percent by hysterectomy (2.3 percent of those sterilized).
2. Residents only.
3. Including 0.3 percent by hysterectomy (3 percent of those sterilized).
4. Actually "existing children." The two distributions are very similar.
5. *Finland, 1977.*
6. Based on 54 percent of all reported abortions in 1972/75, 84 percent in 1975/76, 85 percent in 1976/77, and 77 percent in 1977/78.
7. 1970-75: Estimates of postabortion tubal sterilizations based on Hospital Discharge Survey. Excludes tubal sterilizations in Armed Forces and Public Health Service hospitals and non-hospital-associated surgical clinics. Excludes abortions by hysterectomy, estimated as 0.3 percent of all abortions in 1973-74, 0.2 percent in 1975, and 0.1 percent in 1976-78. *United States, 1979b.*
8. JPSA. Period covered: 1 July 1970 to 30 June 1971. Includes 1.1 percent by hysterectomy (30 percent of those sterilized). *Lewit, 1973; Tietze, 1972.*
9. Including Puerto Ricans.
10. JPSA/CDC. Period covered: 1 September 1971 to 30 June 1975. Including 0.8 percent by hysterectomy (27 percent of those sterilized).

Complications and Sequelae

Induced abortion, at any period of gestation, exposes a woman to a risk of complications that is always larger than zero but that can vary considerably, depending on the circumstances under which the abortion is performed. The severity of complications also varies widely from very minor complaints to the occasional fatal outcome. Complications can be divided into two categories—early, that is, within around one month after the abortion, and late, those occurring more than one month after the procedure. Early complications may be further subdivided into immediate, defined as those occurring (although not necessarily discovered) during the procedure or within a few hours after its completion, and delayed complications, those developing later but still within one month.

Serious immediate complications are rare with abortions performed in medical settings. They include perforation of the uterus by one of the instruments used for instrumental evacuation, sometimes combined with injury to the intestines or other organs; major hemorrhage; laceration of the cervix; severe disturbances of blood coagulation and hypernatremia associated with saline-induced abortions; water intoxication resulting from the use of high doses of oxytocin; and untoward effects of general or local anesthesia.

The most frequent delayed complications include retention of fragments of the placenta resulting in postabortal bleeding; infection, which may range from mild endometritis through more severe forms of pelvic inflammatory disease to generalized peritonitis and septicemia; and venous thrombophlebitis resulting in pulmonary embolism. Postabortal depression has been reported but is rare, and guilt feelings are usually of short duration (*Brewer, 1977; David, 1978b*). The psychological reaction most commonly noted is relief.

Known late somatic complications or sequelae of induced abortions in medical settings are sensitization of Rh-negative women by red blood cells from an Rh-positive fetus, preventable by injection of Rh-immune globulin, and endometriosis in scar tissue after hysterotomy. Over the past decade, several investigators have addressed themselves to the question of possible adverse outcome of pregnancies following induced abortion, primarily low birth weight, short gestation, and second trimester spontaneous abortion. Major problems encountered in these studies include the following:

1 Many women are reluctant to reveal prior induced abortions, even those obtained in legal settings. Because they may be more willing to do so if the outcome of a subsequent pregnancy has been unfavorable (*Hogue, 1975*) or such an event is threatened, it is important that the prior abortion experience be ascertained before an adverse outcome of the subsequent pregnancy is known or suspected.

2 Low birth weight, short gestation, and spontaneous abortion are associated with a variety of background factors, including the woman's age, parity, ethnicity, socioeconomic status, and smoking habits, that may be independently associated with the incidence of induced abortion. Some investigators have not taken these factors into consideration, while attempts at more complete analysis have been constrained by loss of statistical significance.

Because risks to the outcome of subsequent pregnancies are of greatest interest to women who terminate their first pregnancy or pregnancies by induced abortion but may want children later, Table 19 presents a synopsis of nine major studies of the outcome of the first pregnancy following one or more abortions performed in medical settings. These studies were conducted in 16 locations and involved a total of about 12,000 women with abortion experience and 90,000 women in comparison groups.[1] The number of study groups (SGs), defined in terms of location, adverse outcome, and method of abortion, is 29, including two with information on women who had two or more abortions prior to the pregnancy under consideration.

1 When women with one abortion and no other prior pregnancies are compared with women pregnant for the first time (gravida 1), they have a relative risk of adverse outcome greater than unity in only 12 of the 29 SGs.

2 The relative risk is significantly increased (at the 0.05 level) in only two SGs. However, of the 27 SGs with statistically nonsignificant findings, only 13 are large enough to offer at least an 80 percent chance of detecting a risk of adverse outcome twice as large as in the comparison group.

3 The average relative risk (unweighted) is 1.08 for low birth weight, 1.05 for short gestation, and 1.45 for midtrimester spontaneous abortion. The average risk attributable to the abortion is quite small: 0.9 per 100 infants for low birth weight, virtually zero for short gestation, and 1.0 per 100 pregnancies for midtrimester spontaneous abortion.

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[1] Excluding the earliest and largest of the nine studies (*Hungary, 1980*), there were 6,000 women with abortion experience and almost 33,000 women in comparison groups.

4 The two SGs with significantly increased risks of adverse outcomes involved surgical curettage in Hungary and Poland. It is not clear, however, whether the primary cause of the higher risk is the method of abortion or some other biological or social factor associated with geography. No consistent pattern was found in the locations where both methods were used.

5 When women with one prior abortion are compared with women pregnant for the second time following a live birth (gravida 2), the risks are almost always higher than when they are compared with primigravidae. A relative risk significantly greater than unity appears in 6 out of the 25 SGs for which this comparison is possible. This finding reflects the well-established higher risks normally associated with the first pregnancy. It can be argued that the induced abortion has merely shifted these higher risks from the first to the second pregnancy.

6 As one would expect, women who have had two or more induced abortions and no other prior pregnancy are subject to higher risks of adverse outcome in the first subsequent pregnancy than those who have had only one prior abortion. There is no indication, however, that the risks increase more than is explained by the multiple abortion experience. A sharply increased risk of spontaneous abortion after multiple induced abortions was also found in a study not included in Table 19 because it is not limited to first subsequent pregnancies (*Levin, 1980*).

Secondary sterility and ectopic pregnancy can be the late results of pelvic infection following self-induced abortions or abortions performed in nonmedical settings. The role of legal abortion in the etiology of these conditions and of placenta previa and dysmenorrhea has not been established. Sterility can also result from hysterectomy, performed because of major hemorrhage in the course of another abortion procedure, but this is a rare occurrence in medical settings. In the Joint Program for the Study of Abortion (*Tietze, 1972*), 39 secondary hysterectomies were identified among 73,000 legal abortions in 1970/71, or one in 1,900 procedures. The incidence of these tragic events has doubtless declined with increasing experience. In Canada, only 24 secondary hysterectomies were reported among 238,000 abortions in 1974-79, or one in 10,000 cases (*Canada, 1980*).

Adverse psychological sequelae of induced abortion have been a matter of concern. Some authors, including some psychiatrists, have expressed the view that every abortion is a stressful experience involving major risks to mental health. Others have pointed out that most women undergoing abortion continue to lead essentially normal lives and that an adverse psychological reaction to an unwanted birth may be far more common and more serious than an adverse reaction to having an abortion. The WHO Scientific Group on Spontaneous and Induced Abortion concluded early on that "there is no doubt that the termination of pregnancy may precipitate a serious psychoneurotic or even psychotic reaction in a susceptible individual" (*WHO, 1970*, p. 41), but pointed out that emotional stress experienced by the woman may be more closely associated with such factors as the circumstances under which the abortion was performed (legal or clandestine), the period of gestation, the type of operation, and the attitudes of the woman's family and of the professionals and other persons involved in the abortion. This conclusion was reinforced by another Scientific Group, convened eight years later, which stated that "there is now a substantial body of data, reported from many countries after careful and objective follow-up, suggesting frequent psychological benefit and a low incidence of adverse psychological sequelae" (*WHO, 1978*, p. 22). With increasing acceptance of abortion by the medical profession and by the general public, concern about its long-term effects on mental health appears to be diminishing.

A quantitative comparison of morbidity resulting in different countries from, or associated with, legal abortion cannot be made at this time. Although the International Classification of Diseases adequately identifies many types of complications associated with termination of pregnancy, no standards exist for evaluating and recording the severity of these complications. It is, therefore, not surprising that the statistics on the early complications of legal abortions, published by national health authorities, are not comparable.

In 1978, complication rates officially reported from five countries ranged from 0.2 percent to 4.7 percent:

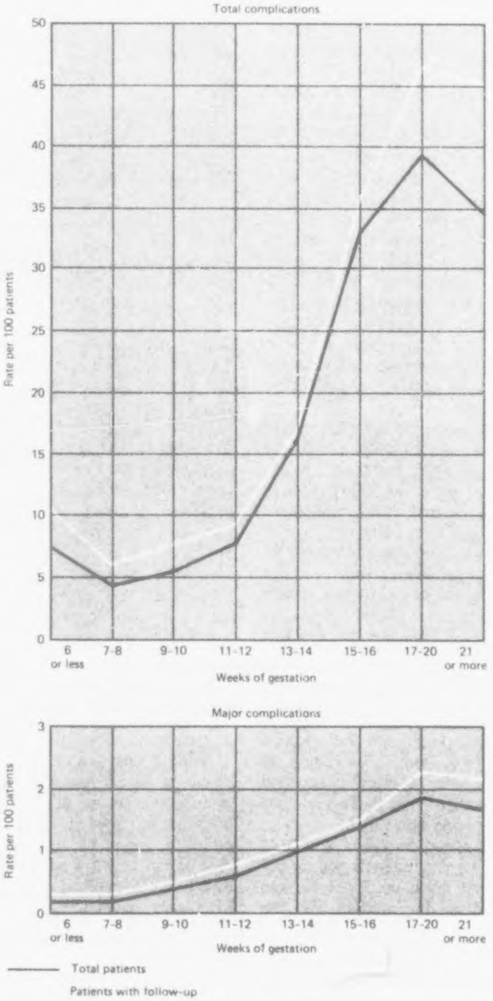
Country	Percent	
Czechoslovakia	0.2	
England and Wales	1.1	
1st trimester		0.7
2nd trimester		3.2
German Fed. Rep. (1979)	2.0	
1st trimester		1.7
2nd trimester		3.7
Canada	2.7	
1st trimester		1.0
2nd trimester		12.0
Denmark	4.7	
1st trimester		4.6
2nd trimester		12.3

The rates for England and Wales are based on the number of complications reported, those for the other four countries on the number of women with one or more complications.

The most comprehensive large-scale investigations of early medical complications of legal abortions were undertaken in the United States by the Joint Program for the Study of Abortion (JPSA), sponsored by the Population Council during 1970/71 (*Tietze, 1972, 1973b*) and continued by the Centers for Disease Control (CDC) as JPSA/CDC from 1971 to 1975. These two large-scale studies permit assessment of the interaction of variables that determine levels of morbidity, such as age and parity, socioeconomic and health status, period of gestation, operative procedure, concurrent sterilization, and other factors.

Rates of "total" and "major" complications obtained by JPSA/CDC are shown in Table 20 and Figure 12. The rates of total complications are very high because the case records submitted by the participating institutions included many minor complaints, such as a single day of fever or vomiting after anesthesia, that are not usually listed in official reports. A broad definition of complications has the advantage of including complaints reported by patients as well as diagnoses by physicians and of permitting the analysis of incidence for comparatively small numbers of women. However, it may produce a distorted impression of the risk to health associated with legal abortion. A more restricted group of major complications was, therefore, identified in the JPSA/CDC, including the following: cardiac arrest; convulsions; endotoxic shock; fever for three or more days; hemorrhage necessitating blood transfusion; hypernatremia; injury to bladder, ureter, or intestines; pelvic infection with two or more days of fever and a peak of at least 40° C or with

FIGURE 12 Range of complication rates per 100 abortion patients without preexisting complications or concurrent sterilization, by weeks of gestation: United States, 1971–75 (JPSA/CDC)



hospitalization for 11 or more days; pulmonary embolism or infarction; thrombophlebitis; unintended major surgery; wound disruption after hysterotomy or hysterectomy; and of course death from any cause. (An almost identical classification was used in the original JPSA.) The total number of cases in the JPSA/CDC with one or more major complications was 6.5 percent of all patients with any complications.

Although every definition of a major complication is arbitrary to some degree, the proportion of such complications, as defined above, among each type of complication corresponded to the judgment of experienced clinicians. Furthermore, the patterns of major and total complications were similar in their association with such variables as period of gestation and operative procedure.

In analyzing the complications of abortion, a distinction should be drawn between complications associated with the termination of pregnancy and those associated with preexisting pathology or with surgical procedures undertaken for other purposes, such as the achievement of permanent sterility or the removal of the uterus because of fibroid tumors. For this reason, complication rates are shown not only for the aggregate of all patients but also for presumably healthy women subject to only the risks associated with the abortion procedure, that is, excluding all women with reported preexisting complications and those undergoing sterilizing operations.

Complication rates are also shown for total patients and for patients with follow-up. Follow-up was defined as any contact with the woman 14 or more days after the abortion, including contact by mail or by telephone either directly by the investigator or by the physician who referred her to the hospital or clinic or by the physician to whom she was referred for aftercare. The complication rate for total patients represents a minimum estimate of postabortal complications in the participating institutions. Since patients with complications are more likely to return for care than those without complications, the rate for patients with follow-up represents a maximum estimate of the incidence of postabortal complications.

As shown in Table 20, the minimum estimate of the total complication rate, including all reported diagnoses and complaints, was 12.3 per 100 for all women in JPSA/CDC. The maximum estimate was 14.9 per 100 women with follow-up. Complication rates were higher at 6 weeks of gestation or earlier than they were at 7-10 weeks, but complication rates during the second trimester of pregnancy were four to five times as high as corresponding rates during the first trimester. The pattern was similar for major complications, which are more significant than total complications. The incidence of total and of major complications increased by about 20 percent with *each week* of gestation from 7 through 20 weeks.

For total and major complications, the rates observed in the group of presumably healthy women, exposed to the risk of abortion only, were lower at each period of gestation.

Rates of total and of major complications were lowest for abortions by suction curettage at 12 weeks of gestation or earlier, followed in ascending order by instrumental evacuation at 13 weeks or later (D & E), intra-amniotic instillation of hypertonic saline solution, instillation of prostaglandin, hysterotomy, and hysterectomy.

The high rates of total complications for saline and prostaglandin instillation reflect a high incidence of retention of the placenta, requiring manual or instrumental removal, and, in the case of PG, of gastrointestinal symptoms, such as vomiting and diarrhea. Total and major complication rates for the two major surgical procedures are virtually identical. Complication rates for hysterotomy include abortions with concurrent sterilization because the two procedures are usually combined.

The differences in major complication rates between instrumental evacuation (D & E) and saline, as well as those between saline and PG, remain statistically significant (with p-values of less than .001 and .01, respectively) after standardization for woman's age, preexisting medical conditions, weeks of gestation, level of operator training, prophylactic use of antibiotics, and follow-up (*Grimes, 1977a, b, c*). The relative position of D & E vis-à-vis saline has also been confirmed by national mortality statistics in the United States and Britain and, most recently, by a controlled study (*Grimes, 1980*). These findings have important clinical and public health implications (*Cates, 1980a; Grimes, 1978*).

For women without preexisting complications who had abortions by suction, the risk of postabortal complications was considerably increased when abortion was combined with tubal sterilization via laparotomy, much less so when the tubes were approached by the laparoscopic route. The laparotomies were of the traditional type, with a comparatively large incision; minilaparotomy was not used in the participating institutions. Complication rates were virtually the same for women who had abortions under local and general anesthesia.

The following additional findings appear to be firmly supported by a number of reports, including several controlled studies with random allocation of patients to different procedures and/or regimens, with excellent follow-up.

1. The incidence of early complications is lower with suction curettage than with surgical curettage (*Andolšek, 1974; Hungary, 1978*).
2. Loss of blood during suction curettage tends to be greater if the procedure is carried out under general anesthesia than if it is performed under local anesthesia (paracervical block). Although this difference was found to be statistically significant in at least one study, it was too small (about 10 ml) to be clinically significant (*Andolšek, 1977*). Perforation of the uterus, cervical injury, and hemorrhage were more often associated with general anesthesia; convulsions and postabortal pyrexia, with local anesthesia (*Grimes, 1979*).
3. The overall rate of delayed complications following suction curettage is about the same for women discharged from the outpatient service of a hospital three to five hours after the procedure and for women remaining overnight in the hospital (*Andolšek, 1977*).
4. The theoretical advantages of flexible over rigid cannulae have not been confirmed by controlled studies. Observed differences in complication rates are small and more often than not appear to favor the rigid models. Other characteristics of the cannula, such as number and site of holes, may be as important as flexibility (*Andolšek, 1976; Antonovski, 1975*).
5. Failure to terminate the pregnancy occurs more frequently with evacuation of the uterus during the first two weeks after a missed period, especially during the first week, than with suction curettage later in the first trimester (*GWUMC, 1974*).
6. The incidence of heavy uterine bleeding, requiring blood transfusion and/or surgical evacuation of the uterus, is higher following the intra-amniotic instillation of prostaglandin $F_{2\alpha}$, than of hypertonic saline solution (*WHO, 1976*). The statement in the WHO report that these differences were not statistically significant is incorrect (*Cates, 1978b*) and was subsequently amended by Bygdeman (*1978*).
7. The safety of immediate IUD insertion after abortion has been demonstrated by many investigators (*Andolšek, 1972; Burkman, 1977; Hue, 1974; Nygren, 1973; Ross, 1978; Solheim, 1976; Tatum, 1972; Timonen, 1974*).
8. According to one controlled study the combined frequency of abortion-related and sterilization-related complications was not significantly increased when the two procedures were done concurrently, compared with a six weeks delay of the sterilization (*Cheng, 1979*).

Successful performance of first-trimester abortions by midwives and other paramedical workers has been reported from several countries (*Faundes, 1972; Karman, 1972b; Rahman, 1980; Scotti, 1976*). Controlled studies comparing the incidence of complications for abortions performed by physicians with abortions performed by paraprofessionals have not been found in the literature.

TABLE 19 Synopsis of studies of adverse outcome of next pregnancies following one or more induced abortions, by type of outcome and method of abortion

					COMPARISON WITH GRAVIDA 1			COMPARISON WITH GRAVIDA 2 AFTER LIVE BIRTH		
Outcome and location of study	Design[1]	Meth. of ab.[2]	Ind. ab.'s[3]	Controlled variables[4]	Attr. risk[5]	Rel. risk[6]	Stat. sign.[7]	Attr. risk[5]	Rel. risk[6]	Stat. sign.[7]
Adverse outcome: Low birth weight[8]										
Upstate New York[9]	HP	VA	1	A,C,E,M,R	2.7	1.45	NS+	3.5	1.67	S
Singapore[10]	HP	MVA	1	R	5.8	1.44	NS+	—	—	—
Hungary[11]	RC−	SC	1	None	3.4	1.33	SSS	5.3	1.65	SSS
Hungary[11]	RC−	SC	2+	None	7.1	1.70	SSS	9.1	2.11	SSS
Copenhagen, Newcastle[12]	RC+	VA	1	A,H,S	1.3	1.26	NS−	0.3	1.05	NS+
Helsinki, Ljubljana, Stockholm[12]	RC+	VA	1	A,H,S	0.9	1.22	NS−	1.9	1.57	NS−
Upstate New York[9]	HP	Sal	1	A,C,E,M,R	1.3	1.21	NS+	2.0	1.36	NS+
Debrecen, Lodz, Warsaw[12]	RC+	SC	1	A,H,S	1.3	1.16	NS+	3.4	1.56	S
Skopje[13]	HP	MVA	1	None	0.3	1.06	NS−	3.9	3.31	NS−
Hawaii[14]	HP	MVA	1	A,R,Y	−0.5	0.90	NS+	0.4	1.08	NS+
Seattle[15]	RC+	MVA	1	A,M,P,Re	−0.8	0.88	NS−	—	—	—
Upstate New York[9]	HP	SC	1	A,C,E,M,R	−0.9	0.85	NS+	0.4	1.08	NS+
Boston[16]	RC+	MVA	1	P,R	−1.4	0.83	NS+	1.0	1.17	NS+
Helsinki, Ljubljana, Stockholm[12]	RC+	SC	1	A,H,S	−1.2	0.51	NS−	−0.8	0.61	NS−
Adverse outcome: Short gestation[17]										
Helsinki, Ljubljana, Stockholm[12]	RC+	VA	1	A,G,S	2.7	1.94	NS−	3.6	2.80	SS
Upstate New York[9,18]	HP	Sal	1	A,C,E,M,R	1.1	1.53	NS−	1.8	2.20	S
Debrecen, Lodz, Warsaw[12]	RC+	SC	1	A,H,S	2.5	1.32	NS+	1.6	1.19	NS+
Copenhagen, Newcastle[12]	RC+	VA	1	A,G,S	0.0	1.00	NS−	0.8	1.21	NS−
Seattle[15]	RC+	MVA	1	A,M,P,Re	−0.5	0.95	NS+	—	—	—
Helsinki, Ljubljana, Stockholm[12]	RC+	SC	1	A,H,S	−0.2	0.91	NS−	0.3	1.20	NS−
Upstate New York[9,18]	HP	VA	1	A,C,E,M,R	−0.4	0.79	NS−	0.1	1.08	NS−
Upstate New York[19,18]	HP	SC	1	A,C,E,M,R	−0.5	0.76	NS+	0.2	1.14	NS−
Boston[16]	RC+	MVA	1	P,R	−1.9	0.72	NS+	0.0	1.00	NS−
Hawaii[14]	HP	MVA	1	A,R,Y	−2.9	0.57	NS+	1.7	1.38	NS+
Adverse outcome: Midtrimester abortion[19]										
Debrecen, Lodz, Warsaw[12]	RC+	SC	1	A,G,S	3.8	2.78	SSS	3.7	2.70	SSS
California[20]	RC+	MVA	1	A,G	1.8	1.81	NS+	—	—	—
California[20]	RC+	MVA	2+	A,G	4.6	3.13	SSS	—	—	—
Helsinki, Ljubljana, Stockholm[12]	RC+	SC	1	A,G,S	1.8	1.76	NS−	2.6	2.80	NS−
Copenhagen, Newcastle[12]	RC+	VA	1	A,G,S	−0.1	0.90	NS−	−0.3	0.77	NS−
Hawaii[21]	HP	MVA	1	A,C,R,Y	−0.9	0.72	NS−	−0.3	0.80	NS−
Helsinki, Ljubljana, Stockholm[12]	RC+	VA	1	A,G,S	−0.6	0.71	NS−	0.1	1.09	NS−

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1. HP = Historical prospective; RC+ = Retrospective cohort, abortion experience ascertained before adverse outcome was known or suspected; RC− = Retrospective cohort, no information when abortion experience was ascertained.

2. Method of abortion: SC = Surgical curettage; VA = Vacuum aspiration (suction curettage); MVA = Mostly VA; Sal = Saline instillation.

3. Number of induced abortions preceding the index pregnancy (2+ = 2 or more); no other prior pregnancy.

4. A = Age of mother; C = County of residence; E = Education; G = Gestation at booking; H = Height of mother; M = Marital status; P = Payment status; R = Race or ethnicity; Re = Religion; S = Smoking habit during pregnancy; Y = Year of outcome.

5. Attributable risk = Difference in frequency of adverse outcome between women with abortion experience and comparison group, expressed in percent of births or pregnancies at risk.

6. Relative risk = Frequency of adverse outcome in women with abortion experience divided by frequency in comparison group.

7. Statistical significance: S = Significant at the 0.05 level; the probability that a difference as great as or greater than found would occur as a result of random variation is one in twenty. SS = Significant at the 0.01 level. SSS = Significant at the 0.001 level. NS+ = Not significant; the probability that a difference as great as or greater than found is greater than one in twenty and the number of cases is large enough to offer at least an 80 percent chance of detecting a doubled risk. NS− = The chance of detecting a doubled risk is less than 80 percent. These probabilities were computed by W. Cates, Jr. of the Centers for Disease Control. His help is gratefully acknowledged.

8. Generally live infants weighing less than 2,500 (or 2,501) gram. Rates per 100 births.

9. *Logrillo, 1980.*

10. *Hogue, 1979, 1980.*

11. *Hungary, 1980.*

12. *World Health Organization, 1979.*

13. *Hogue, 1975.* Method: 64 percent suction curettage, 24 percent surgical curettage, 12 percent other.

14. *Chung, 1980a.*

15. *Daling, 1977.*

16. *Schoenbaum, 1980.*

17. Generally live infants born less than 37 weeks from onset of last menstrual period. Rates per 100 births.

18. Less than 33 weeks from LMP.

19. Rates per 100 pregnancies at risk.

20. *Harlap, 1979.*

21. *Chung, 1980b.*

TABLE 20 Total and major complications per 100 women, by gestation, procedure, sterilization, and anesthesia, for total patients and for patients with follow-up (FU): United States, 1971/75

Gestation (weeks), procedure, sterilization and anesthesia	TOTAL COMPLICATIONS		MAJOR COMPLICATIONS	
	Total patients	Patients with FU	Total patients	Patients with FU
All patients				
6 or less	7.2	10.3	0.4	0.6
7-8	4.7	6.6	0.3	0.4
9-10	5.6	7.7	0.4	0.6
11-12	8.2	9.9	0.8	1.0
13-14	17.0	18.1	1.4	1.6
15-16	33.1	36.2	1.9	2.1
17-20	39.9	47.4	2.2	2.5
21 or more	36.1	47.5	2.3	2.9
12 or less	6.0	8.1	0.4	0.6
13 or more	31.3	35.5	1.9	2.2
All gestations	12.3	14.9	0.8	1.0
Patients without preexisting complications or concurrent sterilization				
6 or less	7.2	10.3	0.2	0.3
7-8	4.4	6.1	0.2	0.3
9-10	5.3	7.3	0.4	0.5
11-12	7.7	9.1	0.6	0.8
13-14	16.4	17.0	1.0	1.1
15-16	33.1	35.7	1.4	1.5
17-20	39.7	46.7	1.9	2.3
21 or more	34.6	45.2	1.7	2.2
12 or less	5.7	7.6	0.4	0.5
13 or more	31.0	34.6	1.5	1.7
All gestations	21.1	14.5	0.7	0.8
Procedure[1]				
Suction curettage[2,3]	4.7	6.5	0.3	0.4
D & E[3,4]	5.5	6.7	0.6	0.6
Saline[3,5]	38.0	47.0	1.7	2.1
Prostaglandin[3,5]	53.1	54.5	2.8	2.6
Hysterotomy[6]	47.0	48.1	13.9	15.2
Hysterectomy	49.5	48.8	13.4	13.4
Suction curettage[1,3]				
6 or less	6.0	9.2	0.2	0.3
7-8	4.0	5.7	0.2	0.3
9-10	4.7	6.6	0.3	0.4
11-12	5.2	6.5	0.4	0.6
D & E[1,3,4]				
13-16	5.6	6.8	0.6	0.7
17 or more	4.8	5.3	0.5	0.5
Saline[1,3,5]				
13-16	42.1	50.9	1.7	1.7
17 or more	36.3	45.4	1.7	2.2
Prostaglandin[1,3,5]				
13-16	55.0	55.5	2.8	2.1
17 or more	51.9	53.9	2.8	3.0
Tubal sterilization[1,2,7]				
Not done	4.7	6.5	0.3	0.4
By laparotomy	22.6	24.5	3.2	3.1
By laparoscopy	7.6	8.5	0.8	1.2
Anesthesia[1,2,3,7]				
Local	4.2	6.0	0.3	0.4
General	5.6	7.5	0.3	0.5

[1] Without preexisting complications.

[2] At 12 weeks of gestation or earlier.

[3] Without tubal sterilization.

[4] Instrumental evacuation at 13 weeks of gestation or later.

[5] Intra-amniotic instillation.

[6] With tubal sterilization.

[7] Aborted by suction curettage.

SOURCE: *United States, 1978*

Mortality

In evaluating mortality following legal abortion, it is necessary to take into account the sources on which the information is based. In the United Kingdom the Abortion Act of 1967 requires the reporting to health authorities of all deaths *associated* with the termination of pregnancy, including deaths resulting from preexisting medical complications. This system permits the linking of each reported death with the period of gestation and with the operative procedure. Although no nationwide reporting system exists in the United States, comparable data have been obtained since 1972 by the Centers for Disease Control of the Public Health Service, in cooperation with other national, state, and local health authorities. For a few earlier years, numbers of deaths associated with legal abortion have been estimated.

In other countries, the statistics on mortality following legal abortion are based on their general system of vital registration and cover only those deaths that are *attributed* to abortion on death certificates. Generally speaking, the categories of attributed and associated deaths overlap to a considerable extent; however, attributed deaths, by definition, exclude deaths assigned to causes other than abortion, and associated deaths may exclude delayed complications with fatal outcome. Mortality of nonresidents may be underestimated in either case.

The earliest nationwide data on mortality following legal abortion originated in northern Europe, where the first steps toward the liberalization of abortion laws were taken in the 1930s. The longest continuous series of data shown in Table 21, that for Sweden, indicates a dramatic decline in mortality over three decades, from 250 per 100,000 legal abortions in 1946-48 to 3 per 100,000 in 1964-77. A comparable series of statistics for Denmark, extending over a longer period but with three breaks in continuity, also shows a marked decline in mortality from 195 per 100,000 in 1940-50 to 2 per 100,000 in 1967-78.

In eastern Europe, Czechoslovakia and Hungary provide the most comprehensive national statistics on mortality following legal abortion. Levels of mortality during the late 1950s and early 1960s in these countries were far lower than those reported from northern Europe, but even these low rates have declined further in recent years. They reflect the virtual limitation of legal abortions in eastern Europe to the first trimester. Although initially viewed with disbelief by some western observers, the experience in eastern Europe has been confirmed by later reports from Britain and the United States.

Mortality associated with legal abortion in England and Wales in 1968-69, following implementation of the Abortion Act, was on a level comparable to that achieved in Denmark and Sweden a few years earlier. By the mid-1970s, it had declined substantially.

In the United States as elsewhere, high levels of mortality from legal abortion prevailed during the period of restrictive legislation, when a significant proportion of the women undergoing abortion suffered from preexisting complications that made them poor risks for any type of surgery. By 1973-75, with elective abortion more easily available to most women, mortality

FIGURE 13 Deaths per 100,000 legal abortions and maternal mortality per 100,000 live births: United States, 1970-78

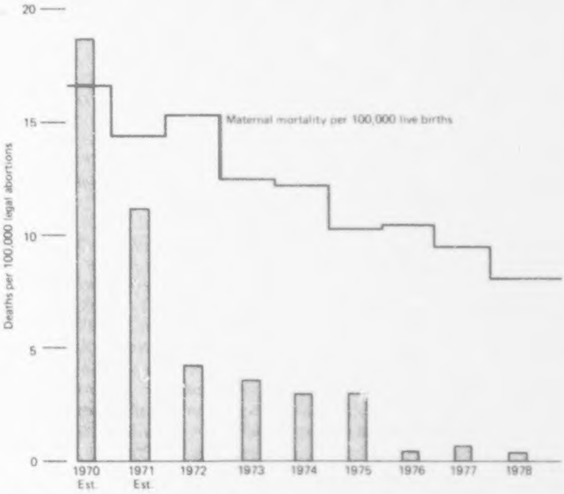
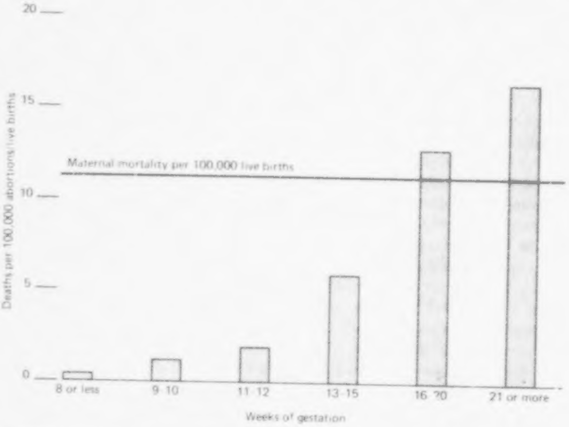


FIGURE 14 Deaths per 100,000 legal abortions, by weeks of gestation and maternal mortality per 100,000 live births: United States, 1972-78



had declined to about 3 per 100,000 legal terminations, followed by a further drop to about 1 per 100,000 in 1976-78 (Figure 13). Although the completeness of abortion surveillance by the CDC has been carefully evaluated and was estimated to have reached 94 percent in 1972-75 (*Cates, 1978a*; see also *Shelton, 1978*), a deterioration of coverage in the most recent period cannot be excluded.

Mortality associated with legal abortions was still much higher in India than in the more developed countries, according to the national reporting system, confirmed by a study of 17,600 abortions performed in 13 teaching hospitals during a 16-month period in 1975/77. It should be noted that the proportion of midtrimester abortions (14 percent) and concurrent sterilization procedures (27 percent) were both *lower* in the teaching hospitals than in the country as a whole.

One of the main factors responsible for the differences among countries in mortality following legal abortion is the period of gestation at which pregnancies are terminated. In the United States during 1972-78, mortality ranged from 0.4 per 100,000 legal abortions at 8 weeks or less to 16 per 100,000 for abortions at 21 weeks or more (Figure 14). Mortality increased by about 30 percent with *each week* of gestation, more rapidly than total and major complications. The pattern of mortality by procedure corresponded closely to the pattern of complications discussed in the section on complications and sequelae.

In Great Britain, for abortions without sterilization during 1968-73, the pattern was similar, but mortality was higher at each stage of pregnancy, reflecting, in part, the earlier time period covered by the statistics. Another factor contributing to the higher abortion mortality in Britain as compared with the United States was the more frequent use of uterine surgery. The high mortality with saline abortions in Britain during 1968-73 cannot be satisfactorily explained. Lack of experience may have been an important factor. Mortality was much higher, at all periods of gestation and with all methods of abortion, for abortions with concurrent sterilization than for abortions without sterilization.

In the United States during the period from 1974 through 1977, mortality was higher for first-trimester abortions performed in hospitals than for abortions performed in nonhospital facilities. The difference disappears when women with preexisting complications and/or concurrent sterilization are excluded. The higher levels of mortality in the NHS hospitals compared with other premises in England and Wales doubtless reflect, at least in part, the more frequent choice of uterine surgery as a method of abortion and the more frequent concurrent performance of abortion and sterilization in the hospitals, especially in the early years. Women aborted in NHS hospitals also tended to be older and their pregnancies were more advanced.

Abortion-related mortality may be compared appropriately with the risk to life associated with carrying a pregnancy to term. In the United States, maternal mortality attributed to complications of pregnancy and childbirth, *excluding* abortion and ectopic gestation, has declined to 11.2 deaths per 100,000 live births in 1972-78. The corresponding rates for England and Wales were 13.1 in 1968-72 and 10.2 in 1973-78. It would appear, then, that in the United States and in Britain, mortality was substantially lower with first-trimester abortion without sterilization than with childbirth. Mortality following late second-trimester abortion, even without sterilization, was higher than maternal mortality associated with childbirth.

The major causes of death following legal abortion, as recorded in the United States during 1972-77 (*Cates, 1980b*), were infection (25 percent), documented or suspected embolism (24 percent), complications of general or local anesthesia (16 percent), and hemorrhage (15 percent). The distribution in England and Wales in 1968-75 (*United Kingdom, 1979a*) was quite similar, although the overall level of mortality was three times higher.

It is generally recognized that mortality is much higher following abortions that are self-induced or induced by untrained persons than after those legally performed in hospitals and clinics. It is impossible, however, to quantify these higher risks, since mortality reflects not only the skill of the persons performing or initiating the illegal abortion but also the availability, utilization, and quality of subsequent medical and hospital services in the event life-threatening complications develop.

In some communities where illegal abortions are performed by untrained persons under unsanitary conditions and where medical facilities are inadequate or shunned because women are afraid of being denounced to law enforcement agencies, mortality ratios may reach or exceed 1,000 per 100,000 illegal abortions. For most countries, taken as a whole, the risk is certainly much lower, especially if many of the illegal abortions are performed early in pregnancy by qualified medical practitioners and/or if hospital care is readily available. Hospital statistics, however, cannot be used to estimate the overall risk to life associated with illegal abortion, since women with postabortal complications are more likely to be hospitalized than those without complications (*Johns Hopkins U., 1980b*).

TABLE 21 Numbers of legal abortions, numbers of associated or attributed deaths, and mortality ratios per 100,000 abortions: Selected areas, years, and characteristics

Area, years, and characteristics[1]	Number of abortions	Number of deaths	Deaths per 100,000 abortions
Canada			
1970-77	333,700	7[2,3]	2.1
Cuba			
1971-74	428,400	5[3]	1.2
Czechoslovakia			
1957-66	731,300	28[4]	3.8
1967-72	587,500	11[3,5]	1.9
1973-79	606,400	5	0.8
Denmark			
1940-50	19,500	38[6,7]	195
1953-57	23,700	16[8]	68
1961-66	27,400	9[9]	33
1967-78	198,600	4[3]	2.0
England and Wales[10]			
Deaths reported on form for notification of abortion[11]			
1968	23,600	3	26
1969	54,800	17	
1970	86,600	14	12
1971	126,800	14	
1972	159,000	15	
1973	167,100	6	3.5
1974	162,900	7	
1975	139,700	3	
1976	129,700	1	
1977	133,000	8	
1978	141,600	6	
Attributed to legal abortion on death certificate[12]			
1968	32,600[13]	5	17
1969	54,800	10	
1970	86,600	10	8.6
1971	126,800	12	
1972	159,900	10	
England and Wales (cont.)			
1973	167,100	4	3.0
1974	162,900	6	
1975	139,700	6	
1976	129,700	1	
1977	133,000	4	
1978	141,600	5	
Identified by Confidential Enquiries into maternal deaths[14]			
1968	32,600[13]	5	17
1969	54,800	10	
1970	86,600	11	9.9
1971	126,800	13	
1972	159,900	13	
1973	167,100	5	3.0
1974	162,900	6	
1975	139,700	3	
Type of service[11]			
NHS hospitals			
1968-72	206,800	55	27
1973-78	321,900	26	7.5
Non-NHS premises			
1968-72	244,900	8	3.3
1973-78	552,200	5	0.9
Gestation, 1973-78[11,15]			
12 weeks or less	700,200	14(+2)	2.3
13 weeks or more	173,900	13(+2)	8.6
Type of procedure, 1973-78[11]			
Instrumental evacuation:[15]			
12 weeks or less	682,200	10(+2)	1.8
13 weeks or more	127,800	6(+2)	6.3
Medical induction	45,900	4	8.7
Uterine surgery	17,700	7	40
Other methods	500	—	—

TABLE 21 (continued)

Area, years, and characteristics[1]	Number of abortions	Number of deaths	Deaths per 100,000 abortions
Finland			
1969-75	133,300	3[3]	2.3
German Democratic Republic			
1973-76	380,200	5[3]	1.3
Great Britain[16]			
1968-73	650,600	83	13
Gestation			
Without sterilization			
8 weeks or less	121,200	3	2.5
9-12 weeks	326,500	14	4.3
13-16 weeks	99,800	12	12
17 weeks or more	23,400	12	51
With sterilization			
8 weeks or less	8,400	2	24
9-12 weeks	40,000	21	52
13-16 weeks	24,600	13	53
17 weeks or more	6,700	6	89
Type of procedure			
Without sterilization			
Instrumental evacuation:			
12 weeks or less	439,000	12	2.7
13 weeks or more	91,000	6	6.6
Uterine surgery[17]	17,000	5	29
Saline	7,200	6	83
Paste	7,600	10	130
Other	8,700	2	—
With sterilization			
Instrumental evacuation:			
12 weeks or less	25,500	7	27
13 weeks or more	3,200	3	93
Uterine surgery[18]	50,400	32	63
Other	600	—	—
Hungary			
Deaths notified by hospitals reporting abortions			
1957-62[19]	917,300	40	4.4
1963-67	912,800	13	1.4
1968-79[20,21]	1,682,500	17	1.0
Attributed to legal abortion on death certificate			
1968-79[20,21]	1,682,500	22	1.3
India			
1975/77[22]	(17,600)	12	68
1975/78[23]	740,000	10	14
New York City			
1943-47[24]	3,050	12	390
New York State[10,25,26]			
1970/72	434,000	29	6.7
Gestation			
12 weeks or less	344,000	10[27]	2.9
13 weeks or more	90,000	19	21
Scotland			
1969-75	45,200	10[28]	22
Sweden			
1946-48	10,700	27[29,30]	250
1949-53	28,000	27[29,30,31]	96
1954-63	35,200	21[32]	60
1964-78	299,500	8[3]	2.7
United States			
1963-68[33]	(9,700)	7	72
1970	193,500	36[34]	19
1971	485,800	54	11
1972	586,800	24[35]	4.1
1973	744,600	25	3.4
1974	898,600	25	2.8
1975	1,034,200	29	2.8
1976	1,179,300	11	0.9
1977	1,316,700	15	1.1
1978	1,409,600	7	0.5
Gestation, 1972-78			
8 weeks or less	3,305,000	13	0.4
9-10 weeks	2,035,000	24	1.2
11-12 weeks	1,053,000	20	1.9
13-15 weeks	337,000	20	5.9
16-20 weeks	367,000	47	13
21 weeks or more	73,000	12	16
Procedure, 1972-78			
Instrumental evacuation:			
12 weeks or less	6,311,000	53	0.8
13 weeks or more	313,000	18	5.8
Medical induction:			
Saline	415,000	38	9.2
Other[36]	108,000	18	17
Uterine surgery	23,000	9	39
Type of facility, 1974-77[37]			
All cases[38]			
Hospital	1,229,000	19	1.5
Other[39]	2,730,000	17	0.6
Excluding women with preexisting complications and/or concurrent sterilization[38]			
Hospital	1,007,000	7	0.7
Other[39]	2,296,000	15	0.7
Yugoslavia			
Croatia			
1968-70	110,700[40]	1[41]	0.9
Slovenia			
1961-74[42]	129,100	3	2.3

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[1] All numbers of abortions are rounded. Because of rounding, components may not add to totals.

[2] *Canada, 1980.*

[3] Attributed to legal abortion on death certificate.

[4] *Černoch, 1964, 1968.*

[5] 1967-78: *Černoch, 1980.*

[6] *Oram, 1952.*

[7] Includes 25 deaths attributed to the procedure = 130 per 100,000.

[8] *Berthelsen, 1958.*

[9] *Olsen, 1970.*

[10] Residents and nonresidents.

[11] 1968-78: *United Kingdom, 1980c.*

[12] *United Kingdom, 1979b.*

[13] Includes 23,600 abortions notified under the 1967 Abortion Act, plus estimate of 9,000 for January-April.

[14] *United Kingdom, 1979a.*

[15] Four deaths of unknown gestation were distributed *pro rata* and are shown in ( ).

TABLE 21 (continued)

16. Includes deaths notified with abortion and deaths not notified but attributed to legal abortion by Confidential Enquiries. *Kestelman, 1978.*

17. Hysterotomy.

18. Mostly hysterotomy.

19. 1957-67: *Mikolas, 1973.*

20. 1968-73: *Hungary, 1977* (volume 1972-73).

21. 1974-79: *Klinger, 1980.*

22. 13 postgraduate teaching hospitals. *India, 1979.*

23. National reporting system. *India, 1980.*

24. Residents only; includes seven deaths attributed to the procedure = 230 per 100,000. *Tietze, 1950.*

25. Includes deaths of nonresidents occurring outside of New York State. *Berger, 1974.*

26. Fiscal years ending 30 June.

27. Includes one woman with an estimated gestation of 8 weeks at the time of procedure who was not pregnant.

28. Identified by Confidential Enquiries into maternal deaths. *United Kingdom, 1978b.*

29. 1946-51: *Klintskog, 1952.*

30. Of 46 deaths during 1946-51, 39 were attributed to the procedure = 140 per 100,000.

31. 1952-58: *Sweden, 1973.*

32. 1959-68: *Sweden, 1971*, p. 49.

33. Survey of hospitals. *Tietze, 1970.*

34. 1970-71. Estimated on basis of deaths attributed to legal abortion on death certificate.

35. 1972-78: *United States, 1980b.*

36. Prostaglandin and urea. Includes a small number of abortions by "other methods" with 6 deaths.

37. *Grimes, 1981.*

38. At or before 12 weeks of gestation.

39. Includes nonhospital clinics (95 percent) and doctors' offices (5 percent).

40. *Štampar, 1973b.*

41. *Štampar, 1973a.*

42. *Krajnc-Simoneti, 1976*, vol. 1, p. 46.

Abortion and Contraception

Because induced abortion and contraception share the prevention of unwanted or mistimed births as a common objective, a high correlation between abortion experience and contraceptive experience exists in populations where both contraception and abortion are available and in which some couples have attempted to regulate the number and spacing of their children. In such populations, women who have practiced contraception are more likely to have had abortions than those who have not, and women who have had abortions are more likely to be contraceptors than women without a history of abortion.

Among women who want to avoid or defer childbirth, but not all of whom practice contraception, the abortion *ratio* tends to be high because many unwanted pregnancies are aborted. Women who practice contraception consistently and effectively, however, experience fewer unwanted pregnancies and therefore a lower abortion *rate*, over a period of time, than those who practice contraception ineffectively or not at all (*Gaslonde, 1976*).

Although abortion and contraception serve the same purpose, patterns of change over time in the use of these two methods of birth prevention, as reflected by the abortion rate and the pregnancy rate (based on the sum of legal abortions, live births six months later, and estimated spontaneous fetal deaths), are not at all uniform. A change in the abortion rate may be associated with a change of pregnancy rate in the same direction or with a change in the opposite direction. This pattern reflects the multiplicity of factors determining the level of the rate of known pregnancies, including the following:

1. Changes in the proportion of women who are sexually active, including changes in the proportion married and changes in the sexual behavior of the unmarried.
2. Changes in the proportion of sexually active women who intend to conceive and give birth.
3. Changes in the contraceptive behavior of women who are sexually active but do not wish to conceive. These changes may involve the adoption or abandonment of contraception, changes of contraceptive methods, and changes in the level of contraceptive vigilance.
4. Changes in the frequency of illegal abortions not included in the official statistics.
5. Changes in the age distribution of women within the reproductive age range.

It will be noted in Table 22 that in some countries pregnancy rates have declined markedly over several years in the presence of rising, constant, or declining abortion rates (e.g., Cuba, 1972-78; Denmark, 1973-79; England and Wales, 1971-76); Hungary, 1974-79). Such declines in pregnancy rates do not prove, but strongly suggest, wider and/or more successful contraceptive practice.

In the United States the proportion of couples using the most effective contraceptive methods (pill, IUD) among all couples relying on reversible methods (i.e., excluding those protected by surgical sterilization of either partner) continued to increase from 50 percent in 1970, when legal abortion became accessible to many women by the passage of a liberal abortion law in New York, to 60 percent in 1973 following the landmark decisions by the Supreme Court in January of that year (*Westoff, 1976*). This trend was reversed or at least stopped between 1973 and 1976 during which time the proportion of couples using the most effective reversible methods declined by one point to 59 percent (*Ford, 1978*). Use of the pill and IUD also declined among unmarried teenagers from 51 percent of all contraceptors in 1976 to 43 percent in 1979 (*Zelnick, 1980*). A particularly marked shift from the pill to the diaphragm appears to have occurred among young women attending college (*Harvey, 1980*).

In Denmark, the authorization of abortion on request in 1973 was followed by a marked increase not only of legal abortions but also of estimated conceptions and an equally marked decline in sales of oral contraceptives while sales of IUDs increased (*Somers, 1976*). However, after 1975, sales of oral contraceptives increased once more (although not to their earlier levels), sales of IUDs rose further, and the numbers of legal abortions, of births, and of estimated conceptions declined (*Denmark, 1979*).

An important aspect of the complex relationship between abortion and contraception concerns the number of abortions required to replace one live birth. In reference to a given pregnancy, the answer to this question is, of course, "one," since a pregnancy can be terminated only once, but a different answer is required when one considers an entire population.

The interval between two successive conceptions has three components: (a) the pregnancy itself; (b) a postgestational anovulatory period during which conception cannot occur; and (c) an ovulatory period during which the monthly probability of conception is more than zero but less than one.

Induced abortion reduces components (a) and (b), because the duration of pregnancy is shortened from about nine months for a live birth to about three months for an abortion and the postgestational anovulatory period is also shortened following an abortion compared with a live birth, the magnitude of the difference depending on the extent and duration of breastfeeding. The average time required for conception during the ovulatory period (c) is presumably not affected. With breastfeeding of moderate to long duration and without contraception, component (b) is comparatively long and component (c) is short, the net effect being that two to three abortions are required to avert one live birth. If contraception is effectively practiced, (c) is extended relative to (a) and (b), with the result that only slightly more than one abortion is required to avert one birth (*WHO, 1970*). Abortion alone is an inefficient method of fertility regulation; however, it becomes progressively more efficient as the expanding use of contraceptives relegates its role to a backstop measure.

The final issue linking abortion and contraception concerns the risk associated with these two methods of fertility regulation. Table 23 illustrates these risks in terms of mortality rates per 100,000 nonsterile, sexually active women per year, by five-year age groups. Mortality rather than morbidity has been chosen as the indicator of "risk to health" because the nonfatal complications associated with abortion and some contraceptive methods differ so widely in their nature and severity as to be essentially noncomparable. The deaths include not only those directly attributable to the method but also those associated with complications of pregnancies and births resulting from contraceptive failure.

The analytical tool for the estimation of mortality rates is a computer model that simulates sets of reproductive events occurring during the childbearing years of a hypothetical birth cohort of women under various regimens of fertility control. The cohort is moved through the reproductive ages in steps of one month, each step representing sequential physiological states of fecundability, pregnancy, and postgestational nonfecundability, under specified assumptions as to contraceptive effectiveness, until permanent sterility intervenes. The monthly rates of births and induced abortions are summarized at the end of the simulation.

The specific assumptions as to the effectiveness of contraceptive methods and as to method-related and birth-related mortality have been described elsewhere (*Tietze, 1976, 1979b*). It should be noted, however, that Table 23 reflects new estimates of birth-related and abortion-related mortality, based on US experience during 1972-78. Because the assumptions as to contraceptive effectiveness and mortality used in the computations are derived from data originating in the United States and the United Kingdom, the model is applicable to developed countries only and not to countries with higher maternal mortality and less adequate medical facilities and services than those on which the assumptions are based (*Potts, 1978*). Furthermore, some of the mortality risks in this analysis are based on studies involving small numbers of cases that are subject to varying, but often major, sampling errors.

The outstanding findings are:

1 Among women under 30 years of age, with the exception of pill takers who smoke, the total risk to life associated with each of the major methods of fertility regulation used alone is about equal and quite low (on the order of 1-2 per 100,000 women per year), significantly lower than the birth-related risk to life without fertility regulation. Pill takers who smoke approach that risk in their late 20s.

2 Beyond age 30, the risk to life (which is almost entirely method-related) increases rapidly for pill users, especially those who smoke. After age 35, the risk for pill users who smoke is higher than for women using neither contraception nor abortion; after age 40, it is three times higher. For all other methods, the risk to women aged 30-44 remains virtually constant or (in the case of those using barrier methods without abortion backup) increases moderately, but remains far below the level of mortality associated with complications of pregnancy and childbirth without fertility regulation.

3 At all ages, the lowest level of mortality by far is achieved by a combined regimen, that is, use of barrier contraceptives with recourse to early abortion in case of failure.

TABLE 22 Legal abortions, live births, and total pregnancies, by year of conception, per 1,000 women aged 15-44: Selected countries, 1970-79

Country	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979
Legal abortions										
Bulgaria	64.0	70.2	70.9	61.2	66.4	65.8	64.5	65.6	68.3	—
Cuba	40.2	47.4	54.9	60.3	69.5	65.3	61.0	55.9	52.1	—
Czechoslovakia	32.3	31.4	29.2	25.9	26.4	25.9	26.8	28.1	29.1	29.4
Denmark	9.4	11.1	12.9	16.2	24.2	27.0	25.8	24.4	22.3	21.6
England and Wales	8.1	10.1	11.5	11.7	11.6	11.2	10.6	10.6	11.4	12.0
German Dem. Rep.	—	—	33.1	32.2	28.8	25.2	23.3	22.0	—	—
Hungary	83.5	81.1	77.5	73.5	44.3	41.9	41.5	39.2	37.0	35.9
Singapore	4.1	7.2	7.7	10.4	13.6	23.5	27.5	28.3	28.9	27.7
Sweden	10.2	12.2	15.2	16.3	19.2	20.2	20.0	19.3	19.4	20.9
United States	4.5	11.2	13.2	16.6	19.6	22.1	24.5	26.9	28.2	30.2
Live births										
Bulgaria	72.6	70.7	71.9	76.6	78.0	77.0	75.5	74.2	—	—
Cuba	142.0	141.1	130.1	115.3	104.7	98.6	89.6	77.2	68.9	—
Czechoslovakia	75.6	78.9	84.1	92.5	92.3	86.9	89.9	87.6	86.8	81.8
Denmark	72.9	75.0	73.3	69.5	70.1	67.2	60.4	59.1	59.0	54.2
England and Wales	84.4	80.2	72.8	68.8	66.3	62.6	58.9	59.2	63.7	64.9
German Dem. Rep.	—	—	55.3	52.0	52.1	53.8	59.4	64.5	—	—
Hungary	64.4	65.3	66.7	71.8	86.2	81.4	80.0	76.0	72.3	68.4
Singapore	97.6	104.3	102.7	90.4	79.1	73.7	72.9	66.1	67.5	67.0
Sweden	71.3	71.3	69.7	68.8	67.6	62.2	59.9	58.1	53.4	58.3
United States	86.5	78.3	71.7	69.5	69.5	66.8	67.9	67.2	67.6	66.4
Total pregnancies[1]										
Bulgaria	161.2	165.6	167.9	163.0	170.5	168.6	165.3	165.0	—	—
Cuba	221.7	228.5	223.0	210.4	207.3	195.1	179.1	158.0	121.0	—
Czechoslovakia	130.0	133.2	137.2	144.1	144.4	137.1	141.9	140.4	140.5	134.6
Denmark	101.5	105.3	105.8	104.7	114.2	113.7	103.9	100.7	98.3	91.5
England and Wales	114.4	111.4	103.7	98.9	95.6	90.6	85.3	85.7	92.2	94.3
German Dem. Rep.	—	—	105.5	100.4	96.8	95.0	99.9	104.8	—	—
Hungary	177.3	170.8	168.6	170.6	156.5	147.8	145.7	138.1	131.1	125.0
Singapore	126.5	138.3	136.8	124.4	113.8	118.0	121.4	113.8	116.2	114.2
Sweden	100.3	102.5	103.8	103.9	105.6	100.0	96.9	93.8	88.1	95.9
United States	113.1	110.2	104.1	105.1	108.4	107.8	111.8	113.6	115.5	116.2

NOTE: Years ending 30 September of calendar year shown.

[1] Including estimated spontaneous fetal losses.

TABLE 23 Birth-related, method-related, and total deaths per 100,000 women per year, by regimen of control and age of woman

	AGE IN YEARS					
Regimen	15-19	20-24	25-29	30-34	35-39	40-44
No control						
Birth-related	4.7	5.3	6.5	10.7	19.3	23.2
Abortion only						
Method-related	0.5	1.1	1.3	2.0	1.9	1.2
OCs only/nonsmokers						
Birth-related	0.1	0.2	0.2	0.3	0.6	0.5
Method-related	0.6	1.1	1.6	3.0	9.1	17.7
Total deaths	0.7	1.3	1.8	3.3	9.7	18.2
OCs only/smokers						
Birth-related	0.1	0.2	0.2	0.3	0.6	0.5
Method-related	2.1	4.2	6.1	11.8	31.3	60.9
Total deaths	2.2	4.4	6.3	12.1	31.9	61.4
IUDs only						
Birth-related	0.1	0.2	0.2	0.3	0.6	0.5
Method-related	0.8	0.8	1.0	1.0	1.4	1.4
Total deaths	0.9	1.0	1.2	1.3	2.0	1.9
Barrier methods only						
Birth-related	1.1	1.5	1.9	3.3	5.0	4.0
Barrier methods, plus abortion						
Method-related	0.1	0.2	0.2	0.3	0.3	0.2

Demographic Effects of Policy Changes

The final section of this fact book deals with the effects of changes in abortion policies on trends in the numbers of legal abortions, illegal abortions, total induced abortions, and births. These effects are more readily predicted a priori than demonstrated by empirical data. Shifts in abortion policy usually occur in a social climate that generates a broad spectrum of responses. But, in a given situation, it is difficult and often impossible to isolate the responses mediated by changes in abortion policy. As would be expected, the cause-effect relationships are more easily recognized in situations in which the changes in abortion policy were major and abrupt rather than minor and gradual.

The only fully predictable result of changes in abortion policy is its effect on the number of legal abortions. As shown in Table 2, liberalization of policy is invariably followed by an increase in the number of legal abortions ranging from minor, as in Sweden in 1975, to spectacular, as in Czechoslovakia in 1958; conversely, adoption of a more restrictive policy results in a decline.

Because of the hazards associated with illegal abortion, one would expect a priori that liberalization of abortion laws and practices would tend to reduce the number of illegal abortions, especially if termination of pregnancy is authorized on request or on social and economic grounds. In fact, concern about a large number of illegal abortions, with the attendant risk to the life and health of women, may be the primary reason for adopting a more liberal abortion policy. However, because the numbers of illegal abortions—either before or after the change of policy—are not known, it is extremely difficult to document the effects of liberalization on the incidence of illegal abortion. It is necessary to rely on various indicators of the frequency of illegal abortion, such as the number of deaths attributed to abortion or the number of admissions to hospitals for aftercare or for the treatment of complications. Each of these indicators, however, may be modified by a variety of factors, of which abortion policy is only one. The number of deaths attributed to abortion may decline because of advances in the treatment of complications rather than because of any changes in the number of abortions or in the incidence of complications; the number of women admitted to hospitals may fail to decline because of an increasing preference for hospital care in all types of illness, including complications of abortion.

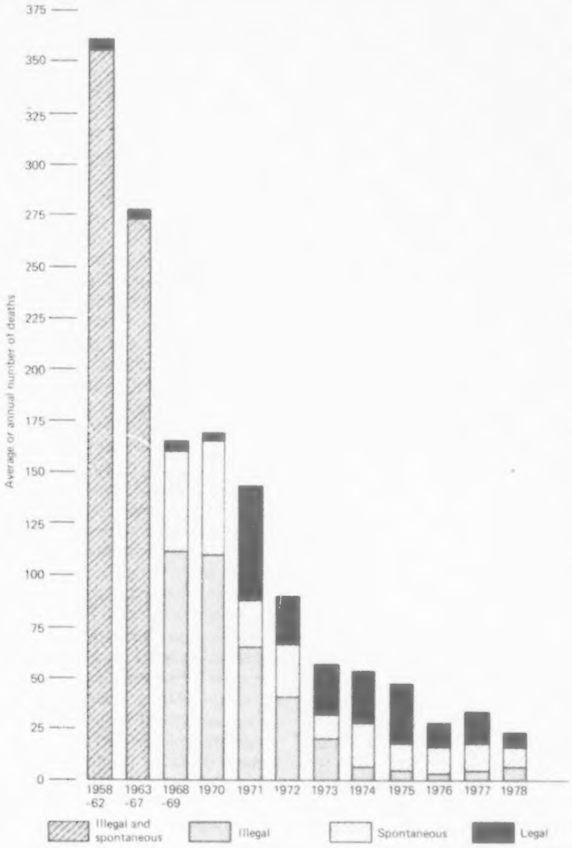
Moreover, the validity of the indicators may also be affected by the change in abortion policy; more deaths may be correctly attributed to abortion because of controversies surrounding the change, or more women may be willing to seek medical care or admission to hospitals because of changes in public opinion associated with a less restrictive policy. Nevertheless, the following generalizations are possible with regard to the incidence of illegal abortion: Moderate extension of the medical indications for legal abortion involves a comparatively small proportion of pregnancies and, therefore, has little effect on the number of illegal abortions, while legal abortion at the request of the pregnant woman or on broadly interpreted social indications substantially reduces the frequency of illegal and self-induced abortions, which is clearly evidenced by declining numbers of deaths.

Table 24 and Figure 15 display the relevant statistics for the United States, covering the period 1958-76. The numbers of deaths shown for 1972-78 are those identified by the surveillance effort of the Centers for Disease Control; those for earlier years are estimates based on the routine registration of deaths by cause, inflated to approximate the more complete coverage achieved by the CDC. The estimation procedure has been described elsewhere (*Tietze, 1979a*, p. 91).

Notwithstanding the inconsistencies of statistical practice and the hazards of estimation, there can be no doubt that the number of deaths associated with abortion has declined dramatically in the United States and that the decline was even steeper in the category of "other than legal" abortions. If we accept for this group 359 deaths annually during 1958-62, 160 during 1968-69, and 19 during 1974-78, we obtain annual rates of decline of 10 percent for the earlier period and of 25 percent for the later period, coinciding with the gradual liberalization of abortion laws and practices. For *all* abortion deaths, including those associated with legal abortion, the annual rate of decline from 1968-69 to 1974-78 was 18 percent, while for deaths attributed to illegal abortion it was 34 percent.

Prior to accepting a decline in abortion mortality as a numerical indicator of a declining number of illegal abortions, an additional factor must be considered: A decline in abortion-related mortality could reflect improved treatment practices. Maternal mortality, excluding deaths attributed to abortion, declined from 30.2 per 100,000 live births in 1958-62 to 11.9 in 1973-78, a drop of 61 percent. It would be inappropriate, however, to extrapolate this reduction in nonabortion maternal mortality to abortion-related mortality. In the 1960s, a substantial proportion of illegal abortions in the United States were performed by physicians, including some highly experienced practitioners. This is no longer true. Women

FIGURE 15 Number of deaths associated with abortion, by type of abortion, United States, 1958-78



having illegal abortions in the mid-1970s were probably the poorest and least educated and were most likely to obtain the services of unqualified practitioners or to attempt self-abortion. It is entirely possible that the death-to-case ratio following illegal abortion is now higher, not lower, than it was 10 or 15 years ago.

In view of these considerations, it would appear that the number of illegal abortions in the United States has declined from about 1960 to the mid-1970s at least as rapidly as, and probably more rapidly than, the reported or estimated numbers of deaths attributed to "other than legal" abortions. Since the number of women of childbearing age (15-44) has increased 38 percent from 1960 to 1978, the decline in the illegal abortion rate per 1,000 women was substantially greater than the decline in the number of illegal abortions. Although more widespread use of more effective contraception, notably the pill and the IUD, and increasing acceptance of surgical sterilization doubtless contributed to the apparent decline in illegal abortions, it is difficult not to link the acceleration of the downward trend since 1968-69 to the legalization of abortion.

Table 25 attempts an international comparison of mortality attributed to abortion, based on cause-of-death statistics during the period 1953-77 (*WHO, 1980*). The countries listed in this table represent about 28 percent of the world's population and include only two of the ten most populous states. Those not shown either do not collect or publish mortality statistics by cause of death or their populations are too small for the computation of stable rates of abortion-related mortality even for five-year periods. Inspection of this table suggests that the reported rates of abortion mortality are more closely associated with the availability of modern methods of contraception (including surgical sterilization), with the general level of health services, and with the adequacy of the registration system, than with the legal status of abortion or the presumed incidence of illegal abortions performed by untrained operators. Some of the reported rates are quite plausible, such as the low rates in Japan, where abortion was legal and accessible throughout the period, and the high rates in most of Latin America. Other rates are puzzling, such as those reported from Bulgaria and Yugoslavia as late as 1973–77 (98 percent attributed to "other than legal" abortions), compared with much lower rates in Czechoslovakia and Poland, countries with similar abortion laws. It would appear that in practice even very liberal legislation does not necessarily achieve its goal of eradicating illegal abortion or does so with a considerable time-lag as long as substantial numbers of women find the available services inaccessible, unacceptable, or at least unfamiliar. These considerations would apply especially in Yugoslavia, noted for the great cultural diversity among its regions. Some village women in remote areas may well prefer the services of the local midwife or even a neighbor to those of the district hospital. Another important factor may be a real or perceived lack of privacy in the governmental institutions, particularly in smaller communities. One may also speculate that some, perhaps many, of the deaths attributed to illegal abortion involved women who failed to seek legal termination of pregnancy within the prescribed gestational limit and thus were exposed to the double jeopardy of late abortion in a nonmedical setting. In that case, a relatively small number of illegal abortions could account for the reported deaths.

It is highly probable that abortion-related mortality is substantially higher in some of the countries not shown in Table 25 than the reported rate in any of the included countries, at any time. For Bangladesh, for instance, A. R. Measham et al. (*1980*) estimated, on the basis of a careful field survey, about 7,800 deaths resulting from complications of induced abortion, corresponding to a rate of 470 per million women of reproductive age.

While the inadequacies of registration constrain the comparative interpretation of the levels of rates of abortion mortality, changes in rates over time convey more useful information. In Czechoslovakia and Hungary, for instance, where abortion laws were significantly liberalized in the mid-1950s, mortality rates declined 56 and 38 percent, respectively, between 1953–57 and 1958–62. Without liberalization, no major country in Europe and North America and few smaller ones recorded a decline of this magnitude during that period.

In England and Wales, where legal abortion became available in 1968, the number of deaths attributed to all types of abortion declined from an annual average of 47 in 1963–67, corresponding to a rate of 4.7 per million women of reproductive age, to fewer than 9 per year in 1973–77 (0.9 per million). Deaths attributed to "other than legal" abortion declined from 44 to a mere 5 annually (4.4 to 0.5 per million).

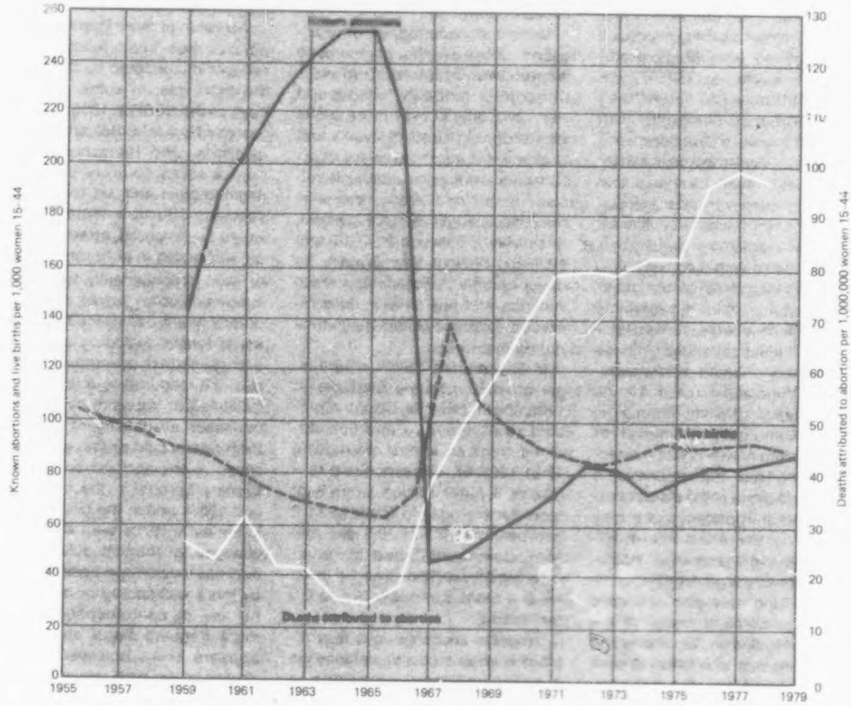
Whereas a change to a less restrictive abortion policy reduces the number of illegal abortions, a change to a more restrictive policy increases it. In Romania, for example, the enactment of a restrictive abortion law in 1966 was followed by a sevenfold increase in deaths due to abortion. The rate per million women aged 15–44 rose from 14.3 in 1965 to 97.5 in 1978 (Figure 16).

Also, the greater availability of legal abortions tends to increase the total number of induced abortions, because some pregnancies are aborted that otherwise would have been carried to term. Because of the decline in illegal abortions, however, the increment in the total number of induced abortions is smaller, absolutely and relatively, than the increment in the number of legal abortions.

Adoption of more liberal abortion policies has been followed in a number of countries by declines in the birth rate; in some countries, such as the USSR in 1936 and more recently Romania, Bulgaria, Czechoslovakia, and Hungary, this was perceived as contrary to the national interest and led to more restrictive abortion legislation. It would be simplistic, however, to ascribe changes in birth rates entirely or even predominantly to changes in abortion policy. Levels and trends of fertility are determined by broad social forces, including antinatalist and pronatalist governmental policies, the response to which may be facilitated or impeded by a greater or lesser availability of abortion. Birth rates would probably have declined in the socialist countries of eastern Europe in the late 1950s and 1960s and in the United States in the early 1970s even without any changes in abortion policy. These declines would have been achieved by more widespread or more careful use of contraception and by more frequent illegal abortions. It appears likely, however, that the decline of the birth rate would have been less marked if abortion laws had not been liberalized. In Singapore, the birth rate declined in response to a comprehensive antinatalist policy. Conversely, pronatalist measures, implemented concurrently with restrictions on the access to abortion, may have contributed materially to the recent increases in birth rates in Czechoslovakia and Hungary.

The impact of a drastic change to more restrictive legislation is more visible, but not necessarily longer lasting, than the effect of

FIGURE 16 Known abortions[a] and live births per 1,000 women aged 15-44, and deaths attributed to abortion per 1,000,000 women aged 15-44: Romania, 1955-79



[a] Legally induced abortions plus women admitted to hospitals for aftercare on treatment of complications of spontaneous or illegally induced abortions.

liberalization. In Romania, restrictive legislation in late 1966 was followed by a sharp increase in the general fertility rate from 62 per 1,000 women aged 15–44 to almost 140 during the 12 months from July 1967 to June 1978 (Figure 16) (*Berelson, 1979; David, 1971; Teitelbaum, 1972*). By the mid-1970s, the fertility rate had dropped to about 90 per 1,000 as the Romanian people discovered, or rediscovered, alternate means of fertility regulation, including folk methods of contraception and illegal abortion (Figure 16). In Hungary, where elective abortion became unavailable for large categories of women on 1 January 1974, the general fertility rate increased from 68 in 1973 to 86 during the 12 months from August 1974 to July 1975. By 1979, the rate had again declined to 71 per 1,000 women aged 15–44.

TABLE 24 Abortion-related deaths, by type of abortion: United States, 1959-78

Year or average	TYPE OF ABORTION				
	All types	Legally induced[1]	Other than legal		
			Total[2]	Illegally induced[3]	Spontaneous
1959-62[4]	364	5	359	—	—
1963-67	276	4	272	—	—
1968-69	164	4	160	111	49
1970	168	36	132	109	23
1971	143	54	89	65	24
1972[5]	90	24	66	41 (2)	25
1973	56	25	31	21 (2)	10
1974	53	25	28	7 (1)	21
1975	47	29	18	4	14
1976	27	11	16	3 (1)	13
1977	33	15	18	4	14
1978	23	7	16	7	9

1. Excludes 10 deaths during 1973-78, shortly after attempted legal abortion attributed to ectopic pregnancy.

2. Illegally induced and spontaneous abortions.

3. Numbers in ( ) are deaths classified as unknown by the CDC but included here.

4. 1959-71: Estimates based on deaths attributed to abortion, inflated to comparability with data for later years.

5. Deaths reported by the Centers for Disease Control (*United States, 1980b*).

TABLE 25 Deaths attributed to abortion per million women aged 15-44: Selected countries and periods, 1953-77

Country	1953-57	1958-62	1963-67	1968-72	1973-77
Australia	13.7	11.0	5.1	3.4(*)	0.2(0.1)
Austria	12.9	11.5	6.9	3.1(*)	2.9(*)
Barbados	—	—	—	47.7(*)	19.5(*)
Belgium	4.4[1]	6.0	3.7	2.6(*)	1.4(*)[1]
Bulgaria	—	—	6.6[1]	6.4(0.2)	9.0(0.2)
Canada	8.8	7.3	4.0	2.1(0.3)	0.4(*)
Chile	106.8[2]	143.3	141.2	80.6(0.1)	48.2(0.1)
Colombia	27.5[2]	32.9	40.8[1]	45.9(*)[2]	—
Costa Rica	—	—	—	20.1(1.2)	17.1(1.9)[1]
Cuba	—	—	—	22.2(0.2)[2]	14.5(1.0)[2]
Czechoslovakia	14.8	6.5	4.3	1.4(0.1)	1.1(0.4)[2]
Denmark	7.9	7.5	3.7	1.0(*)	0.4(*)
Dominican Republic	—	—	—	9.4(*)	9.9(0.3)[2]
Ecuador	—	—	—	17.2(0.3)	—
Egypt	—	—	—	0.9(*)[2]	7.5(0.1)[2]
El Salvador	—	—	—	22.6(*)	—
England and Wales[3]	6.9	5.9	4.7	3.5(1.0)	0.9(0.4)
Finland	15.5	13.7	5.9	2.4(0.2)	1.6(0.7)[2]
France	6.1	6.4	4.6	4.2(0.1)	1.8(0.1)[1]
German Dem. Rep.	—	—	—	—	1.3(0.4)[1]
German Fed. Rep.	13.1	10.0	7.4	4.7(0.2)	2.3(0.1)
Greece	—	—	0.4	0.1(0.1)	0.2(*)
Guatemala	—	—	—	25.7(*)[2]	—
Honduras	—	—	—	12.7(*)	3.4(*)[1]
Hong Kong	—	—	3.0	1.5(*)	0.8(*)
Hungary	31.0[2]	19.2	10.5	6.3(0.4)	2.5(0.3)
Ireland, Northern	3.4	2.1	4.5	3.4(*)	0.7(*)
Ireland, Rep. of	3.2	1.1	1.5	1.5(*)	1.7(*)[2]
Israel[4]	2.3	4.2	2.6	2.6(0.9)	1.8(*)[2]
Italy	6.1[2]	4.4	3.9	3.8(*)	1.9(*)[2]
Jamaica	—	—	—	15.8(*)[2]	—
Japan	7.3	4.5	2.9	1.4(0.5)	0.7(0.3)
Mauritius	—	—	38.9	60.3(*)	67.3(*)
Mexico	—	—	17.0	16.4(0.1)	—
Netherlands	4.0	2.6	1.7	1.1(*)	0.3(0.1)

TABLE 25 (continued)

Country	1953-57	1958-62	1963-67	1968-72	1973-77
New Zealand	14.5[2]	13.0	5.8	1.8(0.3)	0.5(*)[2]
Nicaragua	—	—	—	—	11.9(0.1)[1]
Norway	5.2	2.3	1.1	0.3(*)	0.3(*)
Panama	—	—	—	21.2(*)	—
Paraguay	—	—	—	82.3(*)	86.2(0.8)[1]
Peru	—	—	—	22.5(0.1)	—
Philippines	—	—	15.3	13.2(–)	13.1(0.2)[1]
Poland	—	3.2[1]	2.6	1.4(0.1)	0.8(0.1)
Portugal	26.7[2]	23.8	11.9	10.6(*)	6.1(0.2)[2]
Puerto Rico	—	—	3.0	2.0(*)	2.5(*)[2]
Romania	—	25.2	21.4	66.8(0.6)	87.2(0.7)
Scotland	5.7	6.3	3.2	1.8(*)	1.0(0.6)
Singapore	—	—	10.3	9.1(*)[2]	4.4(*)
Spain	—	—	2.7	2.1(*)	2.3(*)[1]
Sri Lanka	18.5	16.3	11.4	—	—
Sweden	3.0	1.2	1.8	0.3(*)	0.2(*)
Switzerland	9.9	7.2	3.9	3.6(0.2)	1.0(0.4)
Thailand	—	17.0	12.1	12.9(*)	11.1(*)
Trinidad & Tobago	—	46.3[2]	53.9[2]	82.4(*)[2]	49.0(*)[1]
United States[5]	6.9	7.6[6]	5.5[6]	2.6(0.1)[6]	0.3(*)[6]
Uruguay	—	—	—	17.2(*)	14.3(*)[1]
Venezuela	27.2	37.1	41.8	33.6(0.2)	24.0(*)[1]
Yugoslavia	—	—	32.6	16.0(0.2)	5.7(0.1)

NOTE: Statistics on file at the World Health Organization data bank in June 1980. Dash (—) denotes no data or data for one or two years only. Asterisk (*) denotes no deaths or a rate of less than 0.05 per million. Figures or symbols in ( ) denote deaths attributed to legal abortions, included in totals. This information is not available for 1953-67.

1. Data for four years.
2. Data for three years.
3. Comparable rates for earlier periods: 43.9 in 1933-37, 31.0 in 1938-42, 23.0 in 1943-47, 11.0 in 1948-52.
4. Jewish population.
5. Comparable rates for earlier periods: 85.4 in 1933-37, 46.0 in 1938-42, 24.0 in 1943-47, 10.4 in 1948-52.
6. Rates estimated for 1958-71 and based on CDC surveillance for 1972-77: 10.1(0.1); 7.6(0.1); 3.4(0.6); 0.9(0.4).

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ABORTION

The Myths, The Realities, and the Arguments

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1970

CHAPTER VII
TOWARD A SOUND PUBLIC POLICY

Morality and Law

"You can't legislate morality." "Criminal law should never be used to impose minority moral opinions on the society as a whole." "The Catholic Church is the only organization opposing humane abortion laws." "People may follow their own religious convictions in their private lives, but such beliefs should be excluded from legislation and policy-making in a pluralistic society."

Propositions such as these—often worded more subtly or suggested by innuendo—block the path to reasonable examination of the current proposals regarding abortion laws. The argument should be concerned with sound public policy; instead, proponents of relaxed abortion laws divert attention to the religious convictions of many in the opposition. The assumption seems to be that a public-policy position grounded in religious conviction is automatically ruled out of consideration without any hearing on its merits.

In fact, the prevalence of this rhetorical device is no accident. At the annual forum of the Association for the Study of Abortion, held at the Carnegie Endowment International Center in New York City, March 21, 1967, several speakers adopted the slogan: "Public health in proposition; Roman Catholic in opposition." The meaning of the slogan is that the pro-abortion strategy should be to propose legalized abortion as a necessary measure for solving the public health problem caused by criminal abortions, while brushing aside opposition to legalization as "moral," "religious," "theological," "dogmatic," "authoritarian"—in short, as Roman Catholic.

Many proponents of relaxed abortion laws inject theological issues gratuitously into the discussion. A law professor critical of Glanville Williams' heavily theological discussion of the unborn noted quite rightly:

> Indeed, he dismisses the legal status of fetal life as unimportant while basing his proposals for legal reform on the rejection of a theological construct which he creates.[1]

In other words, proponents of legalized abortion prefer attacking straw men to fighting the real obstacles in their way.

This strategy undoubtedly is a clever one. A similar strategy served the birth control movement well. Catholics and other opponents often play into the hands of "liberal" proponents of "humane" (i.e., utilitarian) revisions of abortion statutes by citing religious tradition, Church teachings, and moral convictions regarding the sinfulness of abortion and the status of the unborn as children of God endowed with immortal souls. Such arguments are unacceptable to many "liberals" who regard religious faith as an erroneous subjective conviction.

Arguments in specifically Roman Catholic terms also provoke an automatic, negative reaction among many Americans who regard themselves as "conservative," particularly among those whose white, Anglo-Saxon, Protestant outlook includes a significant element of distortion by anti-Roman-Catholic prejudice. Surely the sincere convictions regarding public policy issues of no other religious group could be vilified so extensively and so continuously as the Catholic position on abortion has been without eliciting a sense of shock and outrage at the appeal to bigotry involved.

Thus, the movement for the abolition of slavery (and its contemporary continuation in the fight against racial discrimination) was largely religious in inspiration; it owed a great deal especially to liberal Protestant leadership. But the convictions of those seeking racial equality were not systematically brushed aside merely because of their religious source. Not even the sincere, though erroneous, current opposition to integration among some fundamentalist Protestants is rejected because of its religious source; it is judged by the common standard of equality before the law, an equality shown by experience to be incompatible with segregation.

The oversimplification involved in the slogan, "Roman Catholic in opposition," is evident from our history of religious views in chapter four. The opposition to abortion on religious grounds was not specifically a Catholic, nor even specifically a Christian position, although it was shared by all Christians until recent times. Even today, as we have seen, Eastern Orthodox Christians and many Protestants continue to regard the unborn as persons having a right to life, a right that may be subordinated only when necessary to preserve the mother's life.

Religious opposition to abortion is common to the entire Indo-European religious heritage, which expressed in many different ways a common conviction that each individual life is sacred, even in the womb, because of man's origin in a transcendent source. Thus Rabbi Immanuel Jakobovits explains that in Jewish doctrine rights are conferred on man by God, but the capital guilt of murder is possible only if the victim is born and viable. But he adds:

> This recognition does not imply that the destruction of a fetus is not a very grave offense against the sanctity of human life, but only that it is not technically

> murder. Jewish law makes a similar distinction in regard to the killing of inviable adults. While the killing of a person who already suffered from a fatal injury (from other than natural causes) is not actionable as murder, the killer is morally guilty of a mortal offense.
>
> This inequality, then, is weighty enough only to warrant the sacrifice of the unborn child if the pregnancy otherwise poses a threat to the mother's life.[2] [*references omitted*]

The Rabbi indicates the Jewish view by contrast with stricter Catholic and less strict Protestant alternatives:

> The traditional Jewish position is somewhere between these two extremes, corresponding roughly to the law as currently in force in all but five American states, namely, recognizing only a grave hazard to the mother as a legitimate indication for therapeutic abortion.[3]

The point I wish to make in quoting Rabbi Jakobovits is not that religious views should determine public policy. Rather, I mean to show that one cannot refute the proposition that "the life of an innocent human being is so sacred that it can never be sacrificed for the health or happiness of someone else" merely by asserting that it is based on theological beliefs. But this is a common practice, as this citation from a professor of law indicates.

> In terms of Catholic theology, the position may be sound, but unless we are to allow it to determine public secular policy, how Catholic theology views the matter seems irrelevant.[4]

This attempted refutation is inadequate, because the proposition it seeks to attack, so far as it has a religious origin, is not dependent upon the specific doctrine and conceptual formulation of human dignity found in Catholic theology.

Dr. George Hunston Williams, a Protestant theology professor at Harvard University, put the point succinctly:

> The Catholic position on abortion should not be assailed as "sectarian" or deplored by some Protestants as "too harsh" in the present ecumenical climate. Historically, the position is in fact Judeo-Christian.

In the same article he expressed willingness to accept legalization of abortion only in cases in which the life of the mother is at stake or the child has been conceived by rape or incest.[5]

Among Lutherans opposition to relaxed abortion laws is widespread, though not universal. Agencies of the Evangelical Church in West Germany have set up consultation centers and distributed anti-abortion literature.[6] Rev. Christian Bartholdy, a prominent Danish Lutheran leader, charged that widespread abortion made Denmark "a nation of murderers" and asserted: "Hundreds of thousands of women walk in this country as murderers." A Catholic Workers group and another Lutheran clergyman attacked Dr. Bartholdy for rejecting abortion while accepting the balance of terror.[7]

Lutheran Pastor Richard John Neuhaus of the Church of St. John the Evangelist, New York, stated at a Governor's Commission hearing: "Opposition to abortion is not peculiar to those who are responsible to the *magisterium* of the Roman Catholic Church." He pointed out the real issue that proponents evade:

> The question is, therefore, raised regarding the legal rights and protections appropriate to the prenatal form of human life. To evade the question as it is posed in this way is both dishonest and socially dangerous.[8]

An editorial in *The Lutheran Standard* similarly declared:

> No American Lutheran should be betrayed into forfeiting his judgment on this issue for either of these two reasons. Whether legal abortion is right or not, dare not be answered by automatically enrolling on the side opposite the Roman Catholics. Nor as Christian citizens can we ever renounce the responsibility to work for laws that express the highest moral insights of the community.[9]

In line with this attitude, representatives of the Lutheran Church have testified *against* relaxing abortion laws at a number of legislative hearings.[10]

But Lutherans are not alone in standing up for the right to life of the unborn. Rev. Charles Carroll is a priest of the Episcopal Diocese of California, married and father of four; he was a student of international law at Yale, Harvard, and Berlin during the Nazi era, an officer of the U.S. Military Government in Germany who attended the trial of the Nazi physicians at Nuremberg. Rev. Carroll has testified at a number of hearings in various states. He cites Thielicke, Barth, and Bonhoeffer—Protestant theologians who upheld the sanctity of the unborn life and who opposed Hitler at the risk of their own lives. Rev. Carroll adds:

> Catholics are not alone opposed to "liberalized" abortion. Many Christians and Jews; many who respect the common law heritage of Anglo-American jurisprudence; indeed many who believe the law to be based upon those norms of behavior necessary to life, liberty and order within human society (and thus not subject to change by majority vote) believe the present laws to be adequate. They declare abortion illegal "unless (it) is necessary to save (the mother's) life," an ugly choice of life for life at best, but a choice mindful of the right to life and the "due process" owed the legal person *in utero.* It was by this standard of the right to life (the sanctity of life, if you will) that we *judged* at Nuremberg. It is this standard by which we shall *be judged.*[11]

Of course, this position cannot be taken as representative of Episcopalian opinion.[12] However, it does show that not all members of a given religious group are represented by statements of that group favorable to relaxation of the laws against abortion.

In 1962, a General Assembly of the United Presbyterian Church, U.S.A., adopted a statement urging that abortion be procedurally limited to cases in which there are "strict medical indications." The basis of this position was stated as follows:

> As Christians we do not condone induced abortion as a means of family planning. (1) The fetus is a human life to be protected by the criminal law from the moment when the ovum is fertilized. (2) The sanctity of the mother's life and that of the child should be respected and preserved. One of the issues often discussed is the question of priority as to saving the mother's or the child's life. This must be decided on the basis of the specific medical problems involved.[13]

Various adherents to the Presbyterian Church can, of course, interpret this resolution in different ways.

State Senator William T. Conklin of Brooklyn, New York, a Presbyterian and father of a mongoloid son, pledged in 1967 to do everything in his power to see that a relaxed abortion bill "never sees the light of day." Opposing all abortion as immoral, Mr. Conklin referred to a statement of New York's Catholic bishops:

> I believe we are all familiar with the tone of that pastoral letter which advised Roman Catholics in New York that abortion is an act that "denies the inviolable rights of the unborn child to life." I agree fully.

Mr. Conklin's mongoloid son is twenty-four years old, lives at home, and is employed as a messenger.[14]

I have not cited these sources as evidence that a large proportion of Protestants and Jews would agree with Roman Catholic views as fully as Mr. Conklin does. Rather my purpose has been to illustrate the fact that not only Roman Catholics and Orthodox Christians but also significant numbers of Protestants and Jews still maintain a traditional view of the sanctity of life before birth.

This view in general, explicitly taken by the General Board of the National Council of Churches in 1961, leads to a rejection of abortion as a method of birth control:

> Protestant Christians are agreed in condemning abortions or any method which destroys human life except when the health or life of the mother is at stake. The destruction of life already begun cannot be condoned as a method of family limitation. The ethical complexities involved in the practice of abortion related to abnormal circumstances need additional study by Christian scholars.[15]

At the same time, as their statement also indicates, abortion for the mother's health as well as for her life was approved and other possible indications (probably those mentioned in the A.L.I. proposal) were recommended for further study. A 1963 position paper of the Church Council of the American Lutheran Church drew the line at cases "where the mother's health is threatened with severe physical or mental impairment," specifically excluding abortion in cases of possible deformity.[16]

Still it might be objected that even if all Christians and Jews were agreed in a single position on abortion they would have no right to urge their ecumenical consensus as a basis for public policy. After all, the United States separates church and state. Should not public policy be formed on strictly secular grounds, to the exclusion of all traditional religious influences? It has been seriously suggested that any legislation that enforces a religiously grounded morality, even in purely secular terms, amounts to an unconstitutional "establishment of religion"; only legislation serving "apparent, rational and utilitarian" purposes is acceptable on this view.[17]

This position amounts to asserting that citizens who have moral convictions are entitled to invoke the law to enforce these convictions only if they are grounded in the areligious ideology of secular humanism, but not if they are grounded in a theological view of human goodness. The utilitarian claims the right to establish his ethics, saying, in effect: "You may not legislate your morality, because I'm going to legislate mine. And I have a right to do so, because mine is areligious while yours is religious."

This position clearly is absurd. The U.S. Constitution forbids the establishment of any religion in order to allow for the freedom of all in this most important matter. But the Constitution does not justify areligious ideologies in their claim to a prior right in the formation of public policy. Many advocates of public programs to alleviate poverty are motivated by a religious conviction that God wills that we love our neighbors as ourselves. Is such legislation, sustained by a motive of this kind, necessarily an unconstitutional establishment of religion? Some utilitarians might support the very same legislation on humanistic grounds. Would their support render the program immune from danger of unconstitutionality? Obviously, secular humanists will oppose legislation for which *they* do not see an "apparent, rational and utilitarian" purpose. But can utilitarianism be made the final judge of the constitutionality of legislation without establishing secular humanism as the official religion of the United States?

Perhaps it will seem fanciful to suggest that the exclusion of religiously formed conscience from public policy determination amounts to the establishment of secular humanism as the official religion. For, after all, secular humanism by definition is *not a religion.* But the point is not well taken.

As Paul Ramsey, Methodist Professor of Religion at Princeton, has pointed out, the U.S. Supreme Court has declared "Secular Humanism" a religion despite its areligious character. The Court ruled in *Torcaso v. Watkins* that the State of Maryland had denied secular humanists the free exercise of their religion by demanding a profession of belief in a Supreme Being from a man as a condition of his serving as Notary Public.[18] In a number of recent cases involving persons having conscientious objections to military service, the court has regarded as religious the basic principle of each individual's conscientious convictions, whether that principle involved belief in God or not. Professor Ramsey concludes:

> A well-founded conclusion from this is that any of the positions taken on controversial public questions having profound moral and human or value implications have for us the functional sanctity of religious opinions. The question concerning non-religious positions is whether they any longer exist; and whether

> proponents of one or another public policy are not, whether they like it or not, to be regarded as religious in the same sense in which traditional religious outlooks continue to affirm their bearing on the resolution of these same questions.[19]

In other words, secular humanists who demand that public policy be judged solely by utilitarian criteria are attempting to impose their particular "religion" (which is as sectarian and dogmatic as any other) on a pluralistic society, many of whose members still believe in a transcendent God.

I do not mean that secular humanists have no right to advocate that society accept a public policy that meets the test of utilitarian judgment. Since they believe that only such a policy can be truly good and humane, they would fail in their civic responsibility if they did not advocate its adoption. Every citizen has a duty to work for the adoption of whatever policy he judges in his own conscience to be in the best interest of the community. Anyone would do wrong who failed to use the means afforded by constitutional political structures both to seek the adoption of what he truly believed to be just public policies and to block the abandonment of such policies, once they have been achieved, to make way for alternatives he considers wrong and injurious to the community.

In making judgments concerning what public policies ought to be adopted, each citizen quite naturally resorts to whatever sources he normally looks to for enlightenment in forming his conscience to guide his own life. The secular humanist no less than the religious believer looks beyond the facts and the merely rational arguments to ideals, values, and purposes that lend human meaning to the facts and human passion to the arguments. Our survey of various positions on abortion laws in chapter five made clear that each position grew out of its own theological or ideological ground. Professor Ramsey states this point well when he says that

> . . . in the debate over abortion and public policy we should hear no more charges that one party or another is trying to legislate for the whole of society a particular religious opinion. That, so to speak, is the name of the game when any serious human, moral and legal question is at issue.
>
> In fact, any fundamental "outlook" productive of an "onlook" on a controversial moral and legal question enters the public forum with the same credentials as one or another of our traditionally "religious" teachings concerning morality and the common life.[20]

Those whose consciences are formed in more traditional religious modes should not be expected to submit their judgments on public policy questions to the "new morality" of utilitarianism--particularly after the United States Supreme Court has seen fit to define as a religion the secular humanism that shapes a utilitarian worldview.

In most cases, the rights of citizens to promote public policies consonant with their religiously formed consciences are unquestioned. Thus, many religious organizations have taken stands on U.S. military policies in recent years. These stands, ranging from total pacifism to advocacy of wars of liberation against "atheistic communism," certainly have contributed to the formation of public policy. Secular humanists also have contributed to the debate. On the whole, proposals have been considered on their merits, not evaded by calling attention to the theological or ideological sources in the light of which citizens are forming their consciences.

Of course, there are differences between the Vietnam debate and the abortion debate. One difference is that both those who look to traditional religion as a moral guide and those who appeal to a secular ideology are fragmented among themselves in regard to Vietnam. Thus the lines of conflict are not so clear as in the abortion debate. Another difference is that the strongest proponents of the legalization of abortion claim only to wish to permit each woman to follow her own conscience on the matter by withdrawing the sanction of criminal law. By contrast, any policy on Vietnam would involve public action.

Yet neither of these differences shows that there is anything inherently wrong in the efforts of those convinced that abortion is evil to block its legalization. There are matters of religious doctrine and ritual that cannot be introduced into public policy itself. For example, religious observance on Sunday cannot be required of all citizens, and the abstinence from foods or drinks of certain kinds or at certain times observed by one or another group cannot be enforced by making it a crime for any citizen to eat or drink in the forbidden way. On the other hand, there is nothing wrong if those who think that a secular day of rest is needed each week urge that it be Sunday, because that agrees with their own religious practices. And there is nothing wrong if those who think that drinking alcoholic beverages is bad for society try to limit and control their use in a way that also would fulfill a religious ideal. Of course, such legislation might be unwise on grounds other than the religious interests of its advocates.

Moreover, the battle lines in the abortion controversy are not so clearly drawn as many proponents of legalization pretend. The National Opinion Research Council poll, summarized in chapter five, concluded that frequency of church attendance was more important than one's particular denomination in shaping attitudes.[21] A more recent sociological study did not support that conclusion, but indicated that only twenty-five percent of persons who claimed no religion favored abortion on demand; thirty-one percent of such persons approved it only for serious health reasons—corresponding to the legal situation prior to the recent enactment of new laws in a number of states. Thirty-one percent is not a majority, of course, but it is a substantial group of people who regard themselves as non-religious and yet who do not reject the "religious morality" embodied in laws forbidding abortion. By contrast, five percent of Catholics, eight percent of Protestants, and thirty-seven percent of Jews were ready to accept abortion on demand; forty-four percent of Catholics, twenty-five percent of Protestants, and two percent of Jews maintained the most restrictive position. The strictest views on abortion were not found among

Roman Catholics, but among Mormons, none of whom accepted abortion on demand and fifty-three percent of whom approved it only for serious reasons of health.[22]

How about the argument that laws against abortion prevent some persons from doing what they believe they ought whereas repealing such laws would not force anyone to have an abortion? Here it is essential to notice that criminal laws frequently have this effect. There are laws against polygamy, ritual snake handling, and the non-medical use of narcotics, and all of these impose community standards on individuals who would choose to do these acts if they were not dissuaded by the sanction of the laws. More to the point, laws that forbid parents to maim their children or that require parents to send children to school "infringe" on parental liberty.

Many proponents of abortion will deny the analogy to these cases, insisting that the unborn child has no standing over against its mother, so that destruction of it with her consent is a purely private affair. But many opponents of legalization will assert that the unborn do have rights and that the public has an interest in protecting them. This issue is not easily settled, but it certainly cannot be disposed of merely by asserting that laws against abortion invade an area that should be left to personal conscience, for that assertion begs the question of whether the aborted also have rights that the law should protect.

These explanations should be sufficient to dispel the confusion that has been created by claims that anti-abortion laws represent an imposition of religion upon public policy. However, there remains a number of other questions regarding the proper relationship between morality and law. First among these questions is whether the moral views of a minority may rightly be imposed upon the majority, even if these moral views are legitimately brought to bear upon an issue of public policy.

The first point to notice is that our government is not simply a system of majority rule. It is a system of checks and balances, arranged to protect minority rights and interests to some extent even against a contrary majority will. The law can enforce desegregation without regard to antecedent majority opinion; in acting to protect minority rights, the apparatus of the law often shapes a public moral consensus that did not exist beforehand. As Felix Cohen said, after calling attention to the limits of the force of law:

> All this is not to argue that law must or should restrict itself to a reflection of the will of the public. The public will can be as foolish and as brutal as any individual will. Regularly it is too formless and irrational a thing to serve as a foundation of law. Indeed the reform of the public will is one of the most essential functions of law.[23]

Even when the majority is so strong that the law fails to protect minority rights effectively—as, for example, it failed to protect the rights of Negroes and Indians—the strength of the majority does not justify its claim to the freedom to deal with the lives, liberty, and property of the minority without public interference.

Indeed, it is interesting that those who wish to legalize abortion entirely also represent a minority, as the polls cited indicate. Dr. Alice Rossi, who reported the National Opinion Research Council poll, stated:

> We may one day have contraceptive devices so foolproof that no failure can occur, but until that day comes, women should have the same freedom to terminate an unwanted pregnancy as they have to use contraceptives to avoid pregnancy.

But in the very same paper, she summarized public opinion in the following terms:

> Any suggestion that the abortion would represent a last-resort means of birth control is firmly rejected by the majority of this sample of adults. It does not seem to matter very much what the condition is, a poor family for whom an additional child would represent an economic hardship, a single woman who does not wish to marry the man she has had sexual relations with, or a married woman who does not want any more children. The American population approves family planning by means of acceptable contraceptive techniques, but any failure of traditional birth control measures should be followed not by an abortion, but by an acceptance of the pregnancy.[24]

Moreover, as I explained in chapter five, analysis of the results of the poll would not seem to indicate majority support even for a relaxation of the law along the lines of the A.L.I. proposal.[25] Majorities favoring legal permission of abortion when the mother's life and health are in fact seriously endangered and smaller majorities supporting legal permission of abortion in actual cases of rape or when there is a real probability of serious fetal defect are favoring a position more in line with existing restrictive laws than with relaxed laws specifically justifying such exceptions. For existing statutes—not by the letter of the law but by judicial interpretation and actual application—permit abortion when it is performed in accord with the common standards of medical practice. As Mrs. Harriet Pilpel, another advocate of abortion on demand, has explained:

> In many hospitals both public and private, in New York and throughout the nation, abortions are being openly performed for such reasons as German measles, incest and rape. Research studies do not disclose a single case where a doctor openly performing such an abortion in a hospital with the support of his professional colleagues has been prosecuted, no less convicted, for violating the law.[26]

Still, Mrs. Pilpel would have the law revised to end "confusion." As we saw in chapter five, revision in accord with the A.L.I. proposal will in actual practice mean the legalization of some measure of abortion on demand, especially under title of "mental health."[27]

Still it is argued that laws against abortion are misdirected since they attempt to "legislate morality." Such attempts cannot succeed; the example of prohibition is often used to illustrate the point.

It must be admitted by everyone that law (especially criminal law) and morality are closely related. If the criminal law does not attempt to enforce all of morality, it nevertheless does not attempt to punish what is generally regarded as morally upright. Indeed, one of the strongest reasons given by those who advocate legalization of abortion is that in their eyes (and in the eyes of many others) there is nothing morally wrong about it. They resent the criminal law's implied moral reproach for an act that they consider blameless and wish to perform or undergo without guilt.

Morality also is a necessary basis for criminal law. Some seldom obey criminal law except out of fear of the sanction attached to it and few would always obey if they could violate the law with impunity. But the vast body of ordinary citizens usually adheres to the standards set by criminal law because those standards are included in and often surpassed by the common moral standards of society.

I am not suggesting that every moral standard should be enforced by criminal law. Cheating at games is immoral, but criminal law need not penalize it. Failing to respond to generosity with gratitude is a moral fault, but one for which the law can supply no remedy. More seriously, to deny one's religious faith or to pretend a faith one does not have is immoral, but the law can neither enforce martyrdom nor condemn hypocrisy. There is no morally significant difference between two persons who decide to perform abortions, if one does so and the other does not for lack of opportunity. Morally, both are abortionists, but no law can touch the person who is an abortionist only in his heart.

In general, both law and morality guide human action toward the realization of human goods, toward the defense of these goods, and toward removal of obstacles to their attainment. But the sphere of law is smaller than the sphere of morality, since law directs action only toward the goods shared in by the whole civil community. Individual citizens and private groups—such as churches, businesses, universities, unions, and families—pursue their own objectives under their own direction, and the law of civil society should not intervene except to the extent that the activities of groups as well as those of individuals bear on the goods common to civil society.

For this reason, immoral acts such as cheating at games, failure of gratitude, and dissimulation or simulation of religious convictions cannot be punished by the law of civil society, since such acts do not in any direct and substantial manner relate to the goods to which civil society directs itself. The immoral act of abortion in one's heart, not executed in deed, lies beyond the reach of criminal law for a different reason—namely, the law cannot punish an act of which there is no overt evidence, and need not attempt to punish acts for which evidence could be gained only by means that would damage the common good. An act committed only in one's heart can become evident only by the testimony of the guilty party, and we accept the principle that no one should be required to testify against himself. Moreover, the thoughts and intentions of one's heart are not directly of much relevance to those aspects of human goods that the civil society shares in common, while the possibility of secrecy about one's own conscious self is very important for the realization of certain aspects of good that can be achieved only by the individual acting alone and in intimate relationships with others.

Lord Patrick Devlin, a jurist and member of the British House of Lords, has argued that it belongs to criminal law to enforce morality as such, since a society's morality is necessary to its stability.[28] I do not agree with this position. A given society's morality, as it actually exists, may well be immoral by an objective consideration—for example, the morality of a society that regards apartheid as a standard does not deserve to be enforced, at least not in that particular. But even if the morality that exists is sound, it is also important to safeguard individual freedom and to maintain limits on the civic community so that it does not become totalitarian. Therefore, criminal law should not attempt to enforce moral standards as such, but it should enforce moral standards insofar as they bear on the goods common to the civil society, affect these goods in a direct and substantial way, and admit of enforcement without damage to the common good and without the use of methods that involve acts such as torture that are immoral in themselves.

In taking this position, I am much more nearly in agreement with H. L. A. Hart, an Oxford Professor of Jurisprudence who has criticized Lord Devlin's thesis, than I am with Lord Devlin himself. Professor Hart has been cited by some proponents of the legalization of abortion[29] because of his view that social benefits must be great enough to justify the limitation of freedom and the misery caused by the legal enforcement of a community standard. But it is important to realize that Hart's position does not exclude the regulation by criminal law of narcotics, blasphemy, and sexual behavior. The use of narcotics can be regulated in virtue of society's paternal interest in the well being of its members, blasphemy can be regulated to the extent that it might lead to a breach of the peace, and sexual behavior might be regulated to the extent that it offends public decency.[30]

The line between justifiable and unjustifiable efforts to enforce moral standards can be illustrated by the example of illicit sexual relations—e.g., fornication, adultery, and homosexual acts. There is general agreement that such acts may be regulated by the criminal law to the extent that public indecency, solicitation, coercion, corruption of minors, and financial exploitation (as in organized prostitution) are involved. The question is whether two adult persons who by mutual consent privately engage in sexual relations, without any aspect of public solicitation or financial exploitation by a third party, should be regarded as criminals by the law of civil society. Professor Hart's position would apparently exclude legal interference with such acts. But his view is strongly influenced by Mill's utilitarianism and his concept of liberty. Can the same conclusion be sustained if an ethical theory such as I outlined in chapter six is taken as the basis for judgment?

It has been argued that criminal law should forbid such sexual acts on the ground that they undermine the institutions of marriage and the family, and that the protection of these institutions falls within the goods common to civil society.[31] I would not disagree with the premises of this argument. However, the social act of making and enforcing criminal law is a positive undertaking, and no affirmative obligation binds us in the unconditional way that prohibitions of acts directly against basic goods bind us. Therefore, without accepting a utilitarian standard for the justification of law, we can properly ask whether making and enforcing laws against the acts under consideration may not be ruled out by the infringement of personal liberty, the invasion of privacy, and other undesirable consequences that would be involved.

Considering the matter from this point of view, I think it reasonable to hold that law ought not to regard fornication, adultery, and homosexual acts in themselves as criminal. Because a law forbidding such acts is not very effective in protecting marriage and the family, because the bad effects on these institutions are often somewhat indirect, because the stability of these institutions can be promoted in other ways, and because much of the harm done by illicit sexual relations can be prevented if public indecency, solicitation, coercion, corruption of minors and financial exploitation are excluded—for these reasons laws forbidding these sexual relations as such do not seem to be demanded by the common good so urgently that the undesirable effects of such laws must be accepted.[32]

Yet to reach this conclusion does not seem to me to entail that existing laws forbidding, for example, homosexual acts must be repealed. To repeal an existing law is not the same as to omit passing a new law. Repeal of existing laws might be taken as social approval of a practice that most people in fact disapprove, and repeal of existing laws might make it difficult to regulate the behavior in those aspects that have a direct social relevance, such as solicitation, public indecency, and so forth.

Perhaps a solution would be to establish special rules of evidence, either by legislative enactment or by judicial decision, that would prevent prosecution of those who really restrict their illicit sexual behavior to private relations with truly consenting adults. Or perhaps the undesirable aspects of repeal of existing laws can be circumvented by strict enforcement of existing or appropriate new statutes against solicitation, corruption of minors, public indecency, procuring, and so forth.

In any case, I do not think it is possible to say categorically, on general principles, that existing laws forbidding illicit sexual relations either should or should not be repealed. Only a consideration of the facts and the resources of the law to deal with the aspects of such behavior that most directly damage the common good could provide a basis for sound judgment on this complex issue. Certainly, it should be possible to find a public policy more considerate of personal liberty and privacy than that involved in such police practices as spying through the walls of restrooms and entrapment by the use of decoys.

On the other hand, public policy need not be pushed to the point that a homosexual couple's "marriage" would have to be recognized as a legitimate union, sharing the legal rights and protections afforded conventional relationships.

We need not regard existing provisions of the Constitution as beyond criticism and possible improvement; that is why a process permitting amendment is possible. However, neither proponents nor opponents of legalization of abortion have called the United States Constituion into question so far as it bears on this issue. In fact, both sides appeal to the basic rights guaranteed by the Constitution itself. In this situation, therefore, it seems to me reasonable to assume that there is nothing objectionable in each side's attempting to shape the laws in accord with its own moral convictions—whether these have religious, areligious, or simply non-religious sources—to the extent that the resulting laws would not be unconstitutional. In other words, one can legislate morality or license immorality to the extent that the protections afforded by the Constitution are not violated and its purposes are not frustrated.

In sum, my position is that laws forbidding abortion ought not to be relaxed or repealed merely because they "legislate morality," nor because they allegedly impose the standards of a minority on the community at large, nor because these laws originated in religious beliefs, nor because the strongest visible support for strict laws against abortion comes from the leadership of the Catholic Church.

The Declaration of Independence did not violate the principle of separation of church and state when it declared that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights," for although a religious belief in the divine source of human rights was thus affirmed, the rights invoked are relevant to the common good of civil society, whatever their origin is or is believed to be.

Richard Cardinal Cushing, Archbishop of Boston, is often quoted by those who advocate legalization of abortion because of his statements:

> There is nothing in Catholic teaching which suggests that Catholics should write into civil law the prescriptions of church law, or in any way force the observance of Catholic doctrine on others.[33]

And:

> Catholics do not need the support of civil law to be faithful to their own religious convictions and they do not seek to impose by law their moral views on other members of society.[34]

Apart from the fact that Cardinal Cushing was referring to a Massachusetts statute regarding contraception, not to the laws against abortion, he also indicated that legislators might vote on secular grounds to maintain the statute.[35] Only those who are themselves confused about the relationship between religion, morality, and law could suppose that Cardinal Cushing's statements endorsed the legalization of abortion. His statements, which are perfectly sound, merely show that Catholic doctrine and church law cannot properly be substituted for the purposes and rights declared in the U.S. Constitution and in the constitutions of the various states as a standard for judging the merits of proposed legislation. Law must protect the goods common to civil society, and it may not be used as an instrument to further the special interests of any segment of the community to the detriment of the whole.

In the controversy over laws forbidding abortion, the central issue is whether or not the unborn should be regarded as persons having rights to be protected by law. The U.S. Constitution guarantees the right to life by providing in the Fifth Amendment (Bill of Rights) that no person shall be "deprived of life, liberty, or property without due process of law" and in the Fourteenth Amendment that state governments may not infringe this guaranteed right. If criminal laws protect the lives of those already born against homicide, can the law justly leave the unborn, or certain classes of them, without similar protection? To this question we must next turn our attention.

Legal Status of the Unborn

The question I wish to discuss here is whether the law *should* regard the unborn as persons whose lives shall enjoy protection according to the concept that no person may be denied due process and equal protection of the laws, a right guaranteed by the Fourteenth Amendment of the U.S. Constitution. My conclusion will be affirmative and will be based on a theoretical argument which can stand independent of the present attitude of the law toward the unborn. However, a merely theoretical argument is unlikely to impress lawyers and judges unless it can be seen as a fitting ratification of precedent legal standards and trends of development. Therefore, I shall pave the way for my theoretical argument by examining in some detail the past and present legal status of the unborn before the law.

Prior to the passage of the relaxed California abortion law, Assemblyman Anthony Beilenson, its sponsor, appeared on a nationwide television broadcast, in the course of which he responded to the argument that his proposal might violate constitutional protection of the right of the unborn to life. Mr. Beilenson asserted as his opinion and that of most of his colleagues conducting hearings on the bill that "there are no legal rights of a fetus."[36] Similarly, Assemblyman Blumenthal of New York, promoter of a relaxed law in that state, told his colleagues in an address:

> The law does not recognize a child until it is born. Nowhere in American or canon law do we find a death action on the part of a fetus.[37]

Lest it be supposed that my argument is constructed against a straw man constituted of oversimplified assertions made in the heat of debate, it may be worth quoting Mr. Glanville Williams, a legal scholar writing in a university law journal:

> A legalistic argument of which some use has recently been made in this connection is that the law recognizes a child as having property rights and protection in the law of tort before it is born. Such arguments are irrelevant. They point out only that when a child *is* born its rights antedate its birth; but this legal determination has no bearing on the moral question as to the beginning of human existence [38] [note omitted].

Leaving questions of canon law to Mr. Blumenthal and other experts in that field and moral questions to Mr. Williams and other moralists, I propose to show that in many ways the law does recognize legal rights of the fetus, that the trend has been toward ever broader recognition of these rights, and that legalization of abortion is a regressive move toward an already discredited position on the question of the legal rights of the unborn.

Rights of the Unborn in the Law of Property

In Roman law, the unborn were understood as actually existing for many purposes.[39] Similarly, in common law, as early as 1586 it was held in *The Earl of Bedford's Case* that although the unborn child is "pars viscerum matris"—part of the mother's insides—the law regards it with a view to its expected birth.[40]

This provision of the law can be interpreted as a mere device, a legal fiction arranged to provide continuity in property ownership and provision as most fathers would wish for those for whose lives they were responsible. A number of cases fit well with this "legal fiction" theory.

For example, a British court in 1823 held that a provision for the heir's children "born in her lifetime" applied to an *unborn* child,[41] which clearly would not be so apart from some construction of law. A Massachusetts court in 1834 rejected the argument that "living" applied only to unborn children that had quickened, holding that any conceived child was within the *meaning of the language* of the bequest.[42] The following year, a Pennsylvania court held that a child should be considered in being before its birth to its benefit, but not to its detriment or to the detriment of its estate.[43] Clearly, being and non-being at the same time is characteristic of fiction, not of reality.

A 1927 New York decision seems to put the fact that we are dealing with a fiction beyond doubt by making the legal consideration of the unborn as "living" contingent upon their subsequent live birth and a prospect of survival.[44] In 1959, a New York court ruled that in property cases an unborn child "is not regarded as a person until it sees the light of day" with the result that a trust could be revoked without its consent, although it would have been interested beneficially and the terms of the trust required the consent of all such *persons* for revocation.[45]

But legal devices, like ordinary fictions, are not without a basis in fact, and it is worth noticing the sort of basis that implicitly or explicitly has been provided by courts for regarding the unborn child as if it were already born.

Conception normally occurs about forty weeks prior to birth; the operative period of the legal fiction therefore is the forty weeks of pregnancy. In 1722 it was held in Great Britain that a contingent devise to one not yet conceived was invalid because the heir's birth might be more than forty weeks after the testator's death, and the judges "were not for going a day farther than a life in being."[46] The implication is that there is *a life in being* throughout the forty weeks of pregnancy.

In 1740 the Lord Chancellor ordered that a posthumous child should be given an accounting of her father's intestate estate by her mother and stepfather. The *ruling* is not exceptional, but the expression chosen by Lord Hardwicke is interesting:

> The principal reason I go upon is, that a child *en ventre sa mere* is a person *in rerum natura*, so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in the father's lifetime.[47]

Here the fiction and its factual foundation are neatly distinguished. The fiction, established by "rules of the civil and common law" is that the unborn child is as much a child of its father as if born in the father's lifetime. The factual foundation is that a child in its mother's womb *is a person* in reality. Notice that the Lord Chancellor does not say "is understood as" a person, but "is a person *in rerum natura*"—the latter expression being the opposite of *in mente.*

Another English case seemed to rest the application of the testator's language, "children living at the time of his decease," to the unborn child upon the fact that the heir had already quickened. The ruling was that "an infant *en ventre sa mere*, who by the course and order of nature is then living, comes clearly within the description . . ."[48]

The fiction theory is perfectly consistent with allowing the unborn to be a person when that is to its benefit, but otherwise regarding it as a non-entity. On the other hand, the real foundation of the fiction demands consistency. In an English case of 1798, the issue was put whether an unborn child should not be considered a non-entity in a case where it gained nothing by being deemed a person. The judicial response was:

> Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons.

This implied, of course, that they are *persons*, not non-entities. On the latter point Justice Buller expanded in a famous passage:

> Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. [*citation*] He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.[49]

The fiction theory suffers an obvious strain, because rights bring with them duties, and one set of rights tends to introduce another.

Some modern American decisions clearly illustrate this last point. In *Industrial Trust Co. v. Wilson* (Rhode Island, 1938) the issue was whether a posthumous child should begin sharing in a trust at the time of her father's death, or only at her own birth. The right of the unborn child to benefit led the court to conclude that she could actually receive income even prior to her birth.[50] A 1938 Alabama decision applied the old rule not to the child's benefit, but to the benefit of a third party.[51] In 1926 a California court, *In re Sankey's Estate*, ruled that a decree entered against *living* heirs applied to an unborn child —thus not to its benefit, but to its detriment.[52]

If an unborn child inherits a portion of land, and this land is sold without the child being suitably represented at a legal process authorizing the disposal of his estate, can the child have the sale set aside? In *Deal v. Sexton* (1907), a North Carolina court ruled that the child could recover from those claiming his title. Why? The court held that the child was to be allowed to recover because it had not been made a party to the case, and "a person must have an opportunity of being heard before a court can deprive him of his rights . . . ." The court also held "that the inheritance vested immediately in the plaintiff, while *en ventre sa mere*, upon the death of the father . . . ."[53] Both points are important. If the inheritance vests *immediately*, the right of the unborn child is not merely a fiction contingent for its legal effect upon his later birth. If the rights of the unborn must be protected under the general principle that a person must have *an opportunity to be heard* before a court can deprive him of his rights, then however much a fictional person the unborn child may be thought to be, his fictional personality entitles him to the due process guaranteed to every person by the U.S. Constitution.

Very likely the personality accorded the unborn by Roman and early common law in matters of property was simply a device; it need not be taken as having meant more than that a causal relation was recognized between the deceased father and his posthumous offspring. But it is interesting to notice that the unborn heir was regularly referred to in these cases as a child. Even in *The Earl of Bedford's Case*, where it was "pars viscerum matris"—part of the mother's insides—it was still "filius"—a *child*.

In more recent times, it seems that there is some tendency for fact to catch up with fiction in this field as it has in so many others outside the law in an age of great scientific advance. Probably an increasing knowledge of the facts of embryogenesis had something to do with this trend; after all, it is not easy to continue to pretend that one is dealing with a fiction when one is aware that the supposed fiction is a fact. Another reason for development has been the changing character of estates. It is one thing to maintain that a child in its mother's womb is merely treated as if it were born at the time of its father's death when its inheritance consists in inalienable real property and social status; it is quite another thing to suppose that a fiction entitles the posthumous child to benefits when the inheritance includes interests that of their nature can be transferred (as the land in *Deal v. Sexton*), or that give rise to liabilities

(*In re Sankey's Estate*), or that may be deemed fruitful or not depending upon when the interest vests (as the trust benefits in *Industrial Trust Co. v. Wilson*).

Rights of the Unborn in the Law of Torts

So far we have considered only cases involving property rights. Now we turn to the law of torts, and a quite different pattern emerges. *Torts* are wrongs—apart from those connected with contractual obligations—done by one person to another, for which the wronged party can seek damages by lawsuit. Under common law, actions for torts did not survive the death of either party; the concept of tort law apparently was to redress the balance of justice which had been upset in the personal relationship between two living persons. Early statutes began permitting heirs to seek recovery for certain types of torts which put them at an obvious disadvantage. Not until 1846 was the first statute passed, about which we shall see more presently, that permitted surviving family members to obtain a remedy at law for the wrongful death of, for example, the breadwinner of the family.[54]

The very nature of the law of torts tends to preclude its extension by legal fiction to embrace non-entities as parties to an action. The wrongdoer (technically called "tortfeasor"), who becomes the defendant in the case, must be in existence in order to do the wrong. The wronged party, who becomes the plaintiff, also must exist in order to suffer injury. Any tendency to broaden the concept of "wronged party" for the advantage of those seeking damages is bound to be strongly resisted by those who would be liable. In property law, which does not inherently involve a conflict of interests (although indirectly it often does), a fictional personality for the unborn was satisfactory enough to all concerned to be easily adopted. In tort law, the status of the unborn could not be legally settled by any such easy and convenient device.

In 1884 a woman four or five months pregnant slipped on a defective street in Northampton, Massachusetts. The child was born prematurely and lived ten or fifteen minutes, but was too young to survive. Action was brought under the wrongful death act against the town. If the woman had broken a limb instead of losing a baby she might well have recovered, but the court ruled against the plaintiff in this case. On appeal, Oliver Wendell Holmes, Jr., then a state judge (later a Justice of the U.S. Supreme Court), upheld the lower court.

The plaintiff argued from analogy with the common law of abortion. We shall see more about this argument later; Holmes brushed it aside, along with an analogy to property law. Holmes also argued that there was no precedent for recovery in such a case, omitting to notice that there was no precedent for refusing recovery either.[55] But the decisive factor in Holmes' opinion was that "the unborn child was a part of the mother at the time of the injury." Even if all other difficulties were surmounted, Holmes denied that

> . . .an infant dying before it was able to live separated from its mother could be said to have become a person recognized by the law as capable of having a *locus standi* in court, or of being represented there by an administrator.[56]

Thus *Dietrich v. Northampton* established the precedent that a *non-viable* unborn child is not a person in tort law.

An 1891 Irish case, *Walker v. Railway Co.*,[57] added to the weight of Holmes' decision. Annie Walker, while "quick with child," was riding on a train; there was an accident and the child, subsequently born, was deformed. The court decided that the railroad was not liable because it had only sold the mother a ticket, and so had no contract with the unborn baby. But the question also was discussed whether the unborn child could maintain an action in tort. The Chief Justice, O'Brien, declined to say yes or no, whereas Justice Johnson asserted:

> As a matter of fact, when the act of negligence occurred the plaintiff was not in esse—was not a person, or a passenger, or a human being. Her age and her existence are reckoned from her birth, and no precedent has been found for this action.

The same judge said:

> As Lord Coke says, the plaintiff was then pars viscerum matris, and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise towards that which was not in esse in fact, and has only a fictitious existence in law, so as to render a negligent act a breach of duty.

Thus the unborn child quick in its mother's womb became a fiction ineligible to recover in tort law.

In 1900 the Supreme Court of Illinois decided a case in accord with the *Dietrich* and *Walker* precedents.[58] Thomas Allaire was born deformed shortly after his mother had a nasty accident in an unenclosed elevator in St. Luke's Hospital, where she had come to have the baby. The court rested the whole case on the issue:

> Had the plaintiff, at the time of the alleged injury, in contemplation of the common law, such distinct and independent existence that he may maintain the action, or was he, in view of the common law, a part of his mother?

The court was faced not with a non-viable infant, for Thomas was born four days after the accident and he survived. Nor was there doubt about the hospital's duty toward the child, since the mother was there to be delivered. Still the court held:

> That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in esse for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth.

Thus *Allaire v. St. Luke's Hospital* apparently settled permanently any idea that unborn children could be regarded as legal persons.

In fact, *Allaire* did become a leading case for the next forty-six years. However, one member of the court, Justice Boggs, dissented with a well reasoned argument, and his dissent was destined to have great subsequent influence. He carefully answered every argument of the majority, pointing out the differences between the *Allaire* case and the two precedent cases. He invoked an analogy with common law regarding abortion. But the heart of his opinion was the argument that it is simply absurd to maintain that a viable fetus is part of its mother

> . . .for her body may die in all of its parts and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother.[59]

Justice Boggs took the narrowest possible ground; unfortunately the majority of the court refused to stand with him on it.

A crack in the dike appeared in a 1939 California case, *Scott v. McPheeters*.[60] The California Civil Code, section 29, contains a special provision by which a child "is deemed to be an existing person" from conception for all purposes to its benefit providing it is subsequently born. This provision obviously formulates the civil and common law fiction. However, appeal to it was made in a case in which an unborn child was injured in delivery before birth. The defendant denied the relevance of the civil code fiction to this tort case. The court held:

> The respondent asserts that the provisions of section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding.

In other words, the fiction is a fact, and so the court allowed recovery. But other states did not follow this precedent immediately, because the *Scott* case involved the provision of section 29 of the California Civil Code.

Thus in 1941, the New Jersey Court of Errors and Appeals still adhered to the old precedents in a case in which the facts showed that a radiologist had negligently caused disastrous brain damage to an unborn baby, who nevertheless was subsequently born and continued to live.[61] The case, *Stemmer v. Kline*, would not have been remarkable, except that a minority opinion written by Chief Justice Brogan resisted the reversal of the lower court's award of damages, particularly attacking Holmes' opinion in *Dietrich* that the unborn child is part of the mother:

> With that premise stated as a fact, it was easy enough to come to the conclusion arrived at; but the premise is not true as a matter of elementary physiology. While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circula-

> tion of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance. It might be remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality.

The "fiction" had become fact. If the majority of the court relied on outdated precedent, the minority appealed to biological facts and concluded that the child developed *distinct personality from conception on.*

The dissents of Boggs and Brogan, forceful and well-argued though they were, might still tell us nothing about the law's view of the matter if majorities had continued to govern their decisions by precedent. The law is what courts rule, not what dissenters say they should have ruled. But in 1946 the dissenting view of Boggs and Brogan became the majority view of the U.S. District Court for the District of Columbia in *Bonbrest v. Kotz.*[62] The suit was for medical malpractice; the baby was injured in the process of delivery.

In his opinion, Justice McGuire notes the strong dissents of Boggs and Brogan and argues vigorously against Holmes. But the decision is based particularly on a Canadian case,[63] which the majority in *Stemmer* refused to regard as precedent because it involved provisions of Canadian statute law. In both the Canadian case and *Bonbrest* the plaintiffs were viable, and this fact made it all the more obvious that they were not merely part of their mothers. Judge McGuire noted in passing, however, that "apart from viability, a non-viable foetus is not a part of its mother." He rejected Holmes' dictum as "a legal fiction, long outmoded," thus balancing the view that the unborn child is a fiction with the view that its identity with its mother was the real fiction.

At this point, it remained doubtful whether courts would limit the unborn child's rights by the criterion of viability, or whether they might declare that children who survived would have a right to recover regardless of whether they were already viable when the damage was done, or whether—as a third possibility—the courts might not declare that even apart from viability, a fetus is a distinct person in being, as *Bonbrest* suggested in passing.

As early as 1916 a Wisconsin court had adopted the *Allaire* dissent and had ruled against a child subsequently born alive merely because it was not viable at the time of the injury.[64] After *Bonbrest,* some courts at first accepted the viability rule as a limit. For example, the Ohio Supreme Court in 1949 asserted the rights of a *viable* unborn infant, because to say that such a child is part of its mother is to rely on "a time-worn fiction not founded on fact and within common knowledge untrue and unjustified."[65]

Some courts have set aside the viability criterion without clearly asserting that the unborn child is an existing person from conception. For example, a New Jersey decision (1960), while declaring that "medical authorities have long recognized that a child is in existence from the moment of conception," did not rest its holding, favorable to the child, on the ground that the child is a person:

> The semantic argument whether an unborn child is "a person in being" seems to us to be beside the point. There is no question that conception sets in motion biological processes which if undisturbed will produce what every one will concede to be a person in being. If in the meanwhile these processes can be disrupted resulting in harm to the child when born, it is immaterial whether before birth the child is considered a person in being. And regardless of analogies to other areas of the law, justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body.[66]

The same concept was adopted in a Rhode Island case in which it was alleged that a pregnant woman was not cared for as effectively as she should have been, with the result that her unborn child suffered preventable damage from German measles. The court did not reject the humanity of the fetus from conception, but relied for its holding on the causal connection between negligence and injury:

> While we could, as has sometimes been done elsewhere, justify our rejection of the viability concept on the medical fact that a fetus becomes a living human being from the moment of conception, we do so not on the authority of the biologist but because we are unable logically to conclude that a claim for an injury inflicted prior to viability is any less meritorious than one sustained after.[67]

However, a number of states have not hesitated to set aside the viability criterion on the straightforward basis that life begins at conception. As one commentator, not too sympathetic to the "biological approach," as he calls it, says, these states "have accorded legal personality to the zygote."[68]

An example is a 1953 New York case, *Kelly v. Gregory.*[69] Mrs. Kelly was only three months pregnant when she was injured by a motorist who ran her down as she was crossing a street in a crosswalk. Her baby was subsequently born handicapped. But it was not yet viable at the time of the accident and the precedent New York case was limited to the area of viability. Justice Bergan, speaking for a unanimous appeals bench, fixed the point of legal separability of the child from its mother at conception, and by analogy with property law held that a right could vest in a child at any time from conception onward. The issue, wrote Justice Bergan, has been the point at which separability occurs:

> We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.
>
> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut

> off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions exist, of course, that have that result at every stage of its life, post-natal as well as prenatal. The complaint here, in alleging that plaintiff was in being in the third month of his mother's pregnancy, alleges a conclusion of fact consistent with generally accepted knowledge of the process.

On one ground or another, since *Kelly* most decisions have found a way to permit recovery for prenatal injuries at any stage of development.[70] This trend certainly has been supported by a recognition of the arbitrariness of forbidding recovery for damage done before viability, when the same injury could have been compensated by damages if it had occurred slightly later. Also, the variability and uncertainty of the time of viability may have had some effect.[71]

Despite what courts have said, those who wish to deny that the unborn have rights before the law might argue—at least for the sake of argument—that the courts had granted only a fictive personality, with contingent rights to be actualized only if the individual was subsequently born alive and suffered disadvantage from the tort committed before his birth. But such an argument loses whatever plausibility it would otherwise have in virtue of the fact that since 1949 courts in a number of states have allowed recovery for the *death* of infants caused by prenatal injury. Such actions have been maintained under the wrongful death statutes of these states.

As we mentioned previously, under common law actions involving torts did not survive the death of either party. On this basis, claims by family members for damage arising from the injury and death of its breadwinner were disallowed. To remedy this obvious injustice, special statutes were passed, beginning with the British Fatal Accidents Act of 1846,[72] otherwise known as Lord Campbell's Act. Many American states imitated this model.[73]

Now, it is obvious from the purpose of these laws that there was not much point in allowing claims for the death of infants, much less of unborn children. If one's child is killed by someone's negligence, there is a serious loss, but since children are inherently priceless, it is not the sort of loss upon which a price can be put, beyond, perhaps, the cost of burial. Indeed, it may even be argued that if actions are permitted for parents to recover for the death of unborn children, the unborn are being regarded less as persons in their own right than as parental property.[74]

Thus it is not surprising that a number of states have not allowed actions for the wrongful death of unborn infants. In Florida, a stillborn child was held not to be a "minor" within the sense of the Wrongful Death of Minors Act.[75] In Michigan, a stillborn child was held not to be a "person" within the sense of the Wrongful Death Act.[76]

There are various reasons why the courts in different states have refused to entertain actions for wrongful death arising from injuries to the unborn. In California, for example, the reason is quite technical; an unborn child might be a *person*, but cannot be held to be a *minor person*.[77] In North Carolina and New Jersey, the problems involved in showing that the tortfeasor in fact caused the death and that the death involved a monetary loss appear to play an important role in disallowing such claims.[78]

New York has steadfastly disallowed wrongful death claims and its policy has been interpreted in a dictum in another kind of case as meaning that the unborn child is no more a person in tort law then he used to be in property law. The tortfeasor is required to compensate the child after birth for damages done beforehand, simply because by *causing* damage the wrongdoer incurs responsibility for it.[79] This dictum seems difficult to reconcile with the reasoning of *Kelly v. Gregory*, and the position certainly is not consistent with that of other states which, as we have seen, regard the right to damages as vesting at the time the wrong to the unborn child is done.

The first case in which an action for the wrongful death of an unborn child succeeded was *Verkennes v. Corniea et al.*, decided by the Supreme Court of Minnesota in 1949.[80] William Verkennes' wife had died in labor, apparently of a ruptured uterus. The basis of the action was that the baby could and should have been saved by prompt surgical intervention, but this was not attempted, and so of course the baby also died. Minnesota law provides:

> When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission.

The defendant had argued that the baby "had in fact never existed as a person in being," and that the suit therefore could not be maintained. The trial court accepted that position, and Verkennes appealed to the Minnesota Supreme Court.

The decision reviewed the history of tort law involving the unborn, beginning with *Dietrich* and emphasizing Justice Boggs' dissent in *Allaire* and the *Bonbrest* decision of three years previously. From the latter was adopted the dictum:

> From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as human being, but as such from the moment of conception—which it is in fact.

Also adopted, however, was the rationale strongly present in Justice Boggs' dissent and visible in *Bonbrest* which rested on the *viability* of the unborn child involved in each of these cases. What *Verkennes* put beyond dispute, therefore, was only that *viable* unborn children could claim standing as persons in tort law. The decision also obviously was facilitated by the wording of the Minnesota statute, quoted above, which demanded the result if *Bonbrest* and other cases following it rather than *Dietrich* were to be accepted as the proper precedent.

By 1968 about half the states had considered wrongful death actions involving unborn plaintiffs, and a slight majority allowed them.[81] Evidence of the underlying rationale in many of these cases is found in *Mitchell v. Couch*, a Kentucky case decided in 1955.[82] The issue again was put as to whether the unborn child is a "person" within the meaning of the statute. The court declared:

> The most cogent reason, we believe, for holding that a viable unborn child is an entity within the meaning of the general word "person" is because, biologically speaking, such a child is, in fact, a presently existing person, a living human being.

This declaration is all the more significant in view of the fact that the relevant statute does not give any special definition of "person," but simply directs:

> Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it. . . .[83]

When Connecticut joined the states allowing such claims in 1966, the old argument that the standing of the unborn is merely a legal fiction once again was turned about in the assertion that their non-entity is the real fiction:

> To deny the infant or its representatives relief in this type of case is not only a harsh result but its effect is to do reverence to an outmoded, timeworn fiction not founded on fact and within common knowledge untrue and unjustified.[84]

All of these cases involved viable fetuses, and some of the rulings seem to make viability an essential condition of recovery. In this respect, wrongful death actions have followed the pattern of development laid down by precedent personal injuries cases, which also at first made viability a criterion. A 1967 Massachusetts case, *Torigan v. Watertown News Co., Inc. et al.*,[85] broke this particular barrier.

Mrs. Torigan was in an automobile accident with a Watertown News Company truck. At the time she was three and one-half months pregnant. The baby was born less than two and one-half months later and lived for only two to three hours. A lower court directed a verdict for the defendants, apparently because "there cannot be recovery for prenatal injury to a nonviable fetus even where a living child is born."

The Supreme Judicial Court of Massachusetts reversed, holding that there is not a sound distinction between the present case and a case in which the fetus is viable. The availability of precedents and the advance of medical knowledge were given as reasons in support of this decision, which directly set aside the old Massachusetts precedent set by Holmes in *Dietrich*. The nonviable fetus was declared to be "a 'person' within the meaning of" the Massachusetts Wrongful Death Act.

In *Torigan* the child was born alive, although unable to survive. However, the decision did not indicate that live birth was a necessary element of the judgment. *Torigan* rejected the viability criterion; other decisions reviewed above rejected the live-birth criterion. There seems to be no essential reason why courts which have allowed such claims should not take the next step and allow recovery for the wrongful death of non-viable fetuses who never live apart from their mothers. There is at least one case in which this step has been taken.

In *Porter v. Lassiter,* decided by the Georgia Court of Appeals in 1955,[86] the mother was pregnant only about a month and one-half when the injury occurred. Apparently the placenta was damaged; the baby was stillborn about three months later—before it would have been viable had it been born alive. The Georgia Code allows the mother or father of a child to recover from the one responsible "full value of the life of such child" in cases of homicide of children.[87] The mother sought recovery under this law and the court ruled that the plaintiff had a case in which the law provided relief.

Considering the purpose for which wrongful death acts were originally passed, I think it would be quite reasonable and not at all unjust if the courts generally ruled that their provisions do not refer to unborn children. Mothers in such cases should of course be compensated for their injuries and for hospital and medical bills that may be connected with a miscarriage. But there is something rather repulsive about parents obtaining a windfall under a law that was designed to save families from the economic disaster so often consequent upon the death, tortiously caused, of one of its contributing members. Probably this sentiment is an underlying factor in the resistance of some of the courts to applying wrongful death acts to the unborn. Where application has been made, the decisions are a tribute to the courts' acceptance of the logical implications of admitting the unborn as plaintiffs in tort law in the personal injuries cases, rather than a reasonable interpretation of the *intent* underlying the statutes applied.[88]

A difference in sentiment perhaps also explains why a number of states admitted as plaintiffs children who were unborn at the time their parents were injured or killed. Thus a child born posthumously was ruled to be entitled to all the benefits of existing children under a New Jersey workmen's compensation act.[89] Under a Michigan dram shop act a posthumous child was held to be a "child" or "other person" entitled to bring suit for his father's death.[90] The unborn child also has been classified as an "existing person"[91] and as a "surviving child"[92] in cases in tort law involving the wrongful death of a parent, and these cases were decided around the turn of the century when the courts, following *Dietrich*, were denying the child standing to sue for injuries before birth to himself. Of course, in these cases the analogy to the position of the unborn in property law is rather strong.[93]

Rights of the Unborn to Support and Care

The analogy is less strong in cases that involve claims under child support laws. For example, in *Metzger v. People* the Supreme Court of Colorado in

1936 affirmed an order requiring a man to contribute thirty percent of his salary to the support of his unborn child. The decision asserted:

> No violence is done to the orderly process of the rational mind by letting the word "child" include a human being immediately upon conception . . . .[94]

Such a right was not simply contingent and prospective, but actually effective before the child's birth, and would have been of benefit to his interest even if he had died before live birth. In *Kyne v. Kyne*, a California case,[95] an unborn child won an appeal that involved his right to have a guardian, to bring suit, to have his father's paternity declared, and to exact support from his father. The court rejected the contention that the suit was premature and that the child should not be allowed to sue until it had been born.

In 1961, a New Jersey court faced a novel type of case.[96] A child not yet born would need a blood transfusion immediately after birth because of Rh-incompatibility. The parents would not consent. The court held that the fetus was "before the court," claimed jurisdiction on the basis of its duty "to protect such persons with disabilities who have no rightful protector," held the fetus to be a "minor child" within the meaning of a statute that authorizes the courts to take custody of children from their parents, and arranged for guardianship for the purpose of having the necessary procedures approved. The court acted on the basis that "it is now settled that an unborn child's right to life and health is entitled to legal protection, even if it is not viable."

The influence of developments in tort law is obvious here. An even more striking case was *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,[97] decided in 1964 by a unanimous New Jersey Supreme Court. A pregnant woman having religious objections was compelled to undergo blood transfusions herself on the basis of the unborn child's rights: "We are satisfied that the unborn child is entitled to the law's protection . . . ." The court, while expressing doubts about the idea that adults should be forced to undergo medical treatment against their conscientious objections, saw no difficulty in the present case, likening it to cases in which the court takes custody of infants from their parents when necessary for the welfare of the children.

Rights of the Unborn and Criminal Law

Thus far we have examined the legal standing of the unborn without taking into account the most significant field in which the law has recognized and protected their rights—namely, the field of criminal law with the condemnation of abortion itself, first under common law and then by various statutes. In chapter five we summarized the relevant common law sources and the statutes.[98] Here we need consider only the implications of the criminal law of abortion for the law's appreciation of the status of the unborn victim. The relevant case law is vast, of course, and only a few cases will be touched upon. Unfortunately, I have found no really extensive study of the field.

As we have seen, common law once considered the crime of abortion after the child was "formed or animated" as homicide or manslaughter. The implication was that such an unborn child was a human being and that abortion was forbidden as an attack upon it. The crime was not clearly separated from murder in Bracton and *Fleta*. Coke made the separation and his view was repeated and accurately formulated by Blackstone. Thus the common law as we know it consisted of the following points:

1) Abortion prior to quickening would not be criminal, unless it were a criminal assault on the woman due to lack of her consent.

2) Abortion after quickening would not as such be a capital crime; it was a misprision or misdemeanor, but "misdemeanor" here meant a crime bordering on capital, not a trivial offense. (We must think of the U.S. Constitution's "high crimes and misdemeanors," which are grounds for impeachment, not a traffic violation or something of that sort.)

3) Abortion after quickening that eventuated in the death of the infant subsequent to a live birth was still held to be murder according to Coke and Blackstone. Murder required that the victim be a "reasonable creature in being, and under the king's peace."

It is important to notice that there are two distinctions here. One depends on whether or not quickening had occurred. The other on whether or not the child lived for some time after expulsion from the mother's body.

It may fairly be conceded that the law at this point regarded the embryo before quickening as a non-person, as one lacking rights. Bracton had drawn the line at the point at which the child is "formed or animated"; what that meant in terms of legal practice is hard to tell. For the later common law, the empirical fact that the child makes itself felt in the mother's womb signified sufficiently that it had come to life, and that it should be treated as a living, human individual.

Why, then, was abortion after quickening not simply classed as murder? The fact is that it *was* murder if the child were live-born and died subsequently as a result of the abortional act. What happened as a result obviously changed nothing with regard to the intent and the malice of the act. An abortionist (perhaps using potions or gross trauma as a method) fulfilled the legal conditions for murder merely by bad luck. Why this legal distinction? Surely not because the standing and rights of the fetus differed according to the time at which it died. Rather, I think, for two technical, legal reasons.

First, because for the capital crime of murder one wants evidence both that the victim had been alive and that it died as a result of the homicidal act. Such evidence was available only if there was a live birth and subsequent death following an attempt to induce premature delivery by a means believed efficacious toward that end. We must bear in mind that surgical methods of destroying the fetus within the uterus are relatively modern and hysterotomy would not have been a practical method in Coke's or even in Blackstone's day.

Abortion was the premature *expulsion* of the fetus; it must often have been born alive.

Second, an even more technical reason comes to mind—and I suggest it only as a hypothesis for further study—why killing the child still in the womb was not murder. If the victim of murder had to be "a reasonable creature in being, and under the king's peace," the embryo prior to quickening did not fulfill the first clause, and the unborn child after quickening did not fulfill the second. Perhaps live birth was required, not because the common law assumed that birth somehow magically conferred reasonable creaturehood (personality) upon what up to the moment of separation from the mother was a mere blob. No, the problem, I think, may have been that until a child was born it was not accounted a *subject* of the king; lying within the mother's womb it lay, *as subject*, beyond the king's reach, outside his jurisdiction. But if the aborted child were born alive, then it was a subject of the king who was killed, and the act by which this result had been intentionally caused became murder. Conceptually, an *abortion that succeeded* in killing the child before birth was an (attempted) *murder that failed* only through lack of a proper subject.

In American case law, there is a division concerning whether one who maliciously injures an unborn infant with the result that it dies subsequent to live birth can be held guilty of homicide. At least one court has held the negative, setting as conditions for homicide that the infant be liveborn and subsequently die of violence inflicted after its independent existence had begun.[99] On the other hand, there are decisions, in line with the common law rule, that hold that homicide is established by injuries inflicted before birth with death occurring subsequent to live birth.[100]

As we saw in chapter five, eight states (as of 1965) included a provision in their statutes along the following lines:

> The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

This provision was first enacted, in these very words, in the New York revised statutes of 1829.[101] The formulation is odd, since it obviously relies upon the common law distinction between the quick child and the one not yet quick, but it also attempts to evade the common law limitation which excluded the concepts of manslaughter and homicide in the case of the unborn.

Even if the child is not born alive, the willful killing of it becomes manslaughter by statutory device, since the act upon the child's mother falls within the law's reach as one that can be classified as murder. The phrase "which would be murder if it resulted in the death of such mother" refers to the common law principle according to which an abortionist causing a woman's death was always guilty of murder whether the woman had consented or not. Thus, this phrase does not *limit* the cases in which the killing of the unborn becomes manslaughter,[102] but provides technical grounds for extending "manslaughter" to include the unborn. Evidently legislators were sensitive to the rights of the unborn, regarded the child that had quickened as a human being, and were trying to extend the criminal law to protect it more adequately. Professor B. James George, Jr. was correct in stating:

> Conceptually these statutes clearly accord independent personality to the fetus, for the killing of the fetus under these circumstances is called manslaughter; and the sections themselves are usually found with the other homicide sections.[103]

The distinction made in common law between the protection afforded the life of the child after quickening and the protection denied embryonic life prior to that stage of development is much illuminated by dicta of American courts in a number of nineteenth-century cases. These dicta interpreted the common law distinction at a time when its erroneous biological basis was being removed from the conceptual apparatus of non-scientists, including legislators and judges, by the popularization of well established facts of scientific knowledge about prenatal life. Of course, old ideas die hard, and so the nineteenth-century courts were still close enough to the mentality of those who had developed the common law's distinction to interpret that mentality for us.

In 1851 a Maine court explained that at common law it was not an offense to procure abortion prior to quickening with the woman's consent. "Quickening" is defined as the mother's sensation of the child's movement in her womb. But after quickening, abortion was criminal. The court explains why in the clearest possible terms:

> [T]he acts may be those of the mother herself and they are criminal only as they are intended to affect injuriously, and do so affect the unborn child. If, before the mother had become sensible of its motion in the womb, it was not a crime; if afterwards, when it was considered by the common law, that the child had a separate and independent existence, it was held highly criminal.[104]

In other words, the intent of the common law was solely to protect the unborn child. It recognized the child's *separate and independent existence* at quickening, and so used this event as a dividing line. Because of its preoccupation with the protection of the life of the quickened child, common law held the mother herself as guilty as anyone else who attacked that life. Moreover, according to this interpretation, the common law did not concern itself with unsuccessful attempts at abortion. It punished only if the acts "are intended to affect injuriously, and do so affect the unborn child."

This understanding of common law is by no means peculiar to this case. A New Jersey court explained the common law in 1858 with regard to abortion after quickening: "It was an offense only against the life of the child."[105] And a Maryland court explained in 1887 that abortion prior to quickening was no crime at common law because "the life of the infant was not supposed to begin until it stirred in the mother's womb. . . ."[106] Here the court implies that it knows better by using the word "supposed." We may contrast this with the expression of a New Jersey decision of 1849 which emphasized the problem of evidence, by saying that the law recognized life and protected it only "at the moment of quickening, at that moment when the embryo gives the first physical proof of life."[107]

In different states having laws classifying some or all abortions as manslaughter, twentieth-century cases have divided on the issue whether the child prior to quickening should be regarded as a suitable example of the victim contemplated by these laws.

In a 1923 Wisconsin case, the defendant was convicted of aborting a woman six or eight weeks pregnant under a statute in the section "Offenses Against Lives and Persons" deeming guilty of manslaughter abortional attempts on "any woman pregnant with a child" that resulted in the death of either the mother or the child.[108] The Wisconsin Supreme Court reversed on the ground that the statute really meant "pregnant with a *quick* child." The court argued that although there is embryonic life at conception in a strictly scientific sense, the law should follow the popular view that life does not begin until quickening:

> Both the quick child and the mother are human beings; hence to unlawfully kill either constitutes manslaughter. A two months' embryo is not a human being in the eye of the law, and therefore its destruction constitutes an offense against morality and not against lives and persons.

The last phrase refers to another Wisconsin statute forbidding abortion, which referred only to "pregnant woman," not to "woman pregnant with a child," and prescribed much lighter penalties. This latter statute was in the "Offenses Against Chastity, Morality, and Decency" section, and the court was holding that the defendant had been indicted under the wrong statute.

In an Oregon case a conviction for manslaughter was sustained by the Oregon Supreme Court, and a subsequent attempt to appeal to a federal court was unsuccessful.[109] Oregon did not have multiple statutes regarding abortion; its statute referred to acts done on a woman "pregnant with a child" which resulted in the death of either the child or the mother. In this case both died. (In the Wisconsin case, the mother did not die.) The defense objected to the trial court's instruction that a woman is pregnant with a child from the time of conception; in the view of the defense, the instruction should have been based on quickening. The woman had been only three months pregnant. In rejecting this argument, the court explained the process of conception and concluded:

> From the moment of conception a new life has begun and is protected by the enactment. The product of conception during its entire course is imbued with life and capable of being destroyed as contemplated by law.

It is ironic that subsequent revision of Wisconsin's statutes, while retaining an increase in penalty based on quickening, expressly defines "unborn child": "In this section 'unborn child' means a human being from the time of conception until it is born alive."[110] Thus the Wisconsin court's reliance on "popular conceptions" to deny the status of "human being" to the two months' embryo was disavowed by a more enlightened legislature. On the other hand, Oregon in 1969 adopted a new abortion law including a provision that "substantial risk" to the mother may be estimated by taking into account "the mother's total environment, actual or reasonably foreseeable."[111]

What our inquiry has shown thus far is that in criminal law, both at common law and according to many statutes, the killing of the child after quickening was regarded as an offense against a human life in being. Conceptually criminal law has regarded the unborn as persons having a right to life that should be protected. But quickening was taken as the beginning, or the certainly proved beginning, of separate life. And the crime, even against a quick child, was not murder, probably for technical reasons, unless the aborted child were born alive and subsequently died.

Someone thinking in terms of modern abortional techniques might argue that the common law covered few abortions, since most abortions are now induced well before quickening occurs, and that almost none could have been regarded as murders, since few abortions now result in live births. Usually the infant is killed *within* the mother. With few reliable statistics and little accurate information about present criminal abortions and the legal disposition of abortion cases, it is difficult to say anything certain about contemporary experience. We know much less about the situation prior to the past century. Yet it may not be idle to speculate that before modern times a large proportion of successful abortions may have been caused by the induction of labor too early, with the birth and subsequent death of the non-viable fetus.[112]

At the same time, we must not omit to notice, in passing, that hysterotomy, by which advanced pregnancies are often aborted today, is a procedure that delivers a live baby. Undoubtedly this method was used in the case at Stobhill Hospital in Glasgow, in which a twenty-year-old girl was delivered of a twenty-six-week fetus, which was later found alive in the bag into which it had been dumped to be thrown into the incinerator.[113] This case occurred under the new British abortion act which, like the A.L.I. proposal, accepts as legal, to the extent that the common law and the new statute overlap, abortions which would have been murder under common law. To this extent it is not false, but is strictly true, that the new abortion laws are legalizing *murder.*

Dr. Ian Donald, Professor of Obstetrics and Gynaecology at the University of Glasgow, warned in advance what was to be expected of the new British act, and what came to pass in Stobhill Hospital. Dr. Donald, an Episcopalian, in a 1966 speech in opposition to the bill then under debate, said:

> Make no mistake about it. An unborn baby, even a very small one, can put up a determined fight for life. An abortion can be born alive and can kick and go on kicking for quite a long time. It is not difficult to see this as a sort of slow murder. On the other hand, the baby can be killed while still inside. Is there so much difference? The intention is the same.[114]

As a physician, Dr. Donald does not make the technical distinction established by common law.

However many babies were protected by the common law's prohibition of abortion, the central fact for our present purpose is that criminal law has in fact recognized the right of the unborn, quick child to life. And this right has been protected.

Statute laws extended the protection to the period prior to quickening. We must now examine the reason for this extension. Did it evidence an appreciation of the fact that the physiological presupposition of the quickening criterion is erroneous? Or did legislators have some other motive for creating legal prohibitions of abortion in early pregnancy?

One suggestion, made in a legal article questioning the constitutionality of statutes forbidding abortion, is that those forbidding it prior to quickening were primarily motivated by

> . . .the interests of community elders in compelling uniform adherence to specified moral norms. These precepts generally defined human sexual activity as chiefly procreative in function and nature. Legal bans on both contraception and all abortion followed. A secondary consideration, universally held to be humane in its aim, was to protect pregnant women from the unskilled abortionist.[115]

No evidence is given by this author for his theory as to the primary aim of these laws. I believe that a search of the statutes would show that statutes regarding abortion and contraception were seldom closely related. However, the author saves us from the task of such a detailed search by linking his theory with post-Civil War moralism:

> Abortion apparently raised no legal or moral controversy in this country until the post-Civil War period. During this era, however, a repressive ascetic ethic gave rise to the present-day framework of abortion legislation.[116]

In other words, the statutes against abortion are *Victorian.*

This argument simply will not hold, for statute laws forbidding abortion originated long before the period in question. Before the Civil War, the following states (or territories) had statutes forbidding abortion that on their face, at least, dealt with abortion prior to quickening: Alabama (1840–41), Illinois (1827), Indiana (1835), Iowa (1838–39), Kansas (1855), Louisiana (1856), Maine (1840), Massachusetts (1845), Michigan (1846), Missouri (1835), New Hampshire (1848), New Jersey (1849), New York (1830), Ohio (1834), Texas (1859), Vermont (1846), Virginia (1848), Washington (1854), and Wisconsin (1858).[117]

It would be a very large task to try to discover the purposes that motivated legislators in passing all of these statutes. Undoubtedly, as we shall see, concern for women's lives and health was one factor, though not the only one. What is certain beyond doubt is that the "repressive ethic" of the post-Civil War period had not the slightest influence in 1827 when Illinois passed the first of those laws, in 1829 when New York passed the second of them, in the 1830s when four of them were passed, in the 1840s when eight of them went on the books, or even in the 1850s when five of them were enacted.

An examination of certain of these statutes is sufficient to judge on intrinsic evidence alone that regard for unborn life, prior to quickening, was a precise motive for the enactment.

As we saw in chapter five, in Blackstone's day there were no statutes against abortion, but there was a statute regarding the concealment of birth and the subsequent death of a child who would have been a bastard; the statute established a presumption of murder in such a case.[118] Obviously, the purpose here was not the mother's health, and the statute was at least a century too early to be explained by Victorian moralism.

Maine had a statute to deal with concealment of birth and death of a bastard in 1830. In 1840 the statutes were revised, and *immediately following* sections retained from the 1830 laws were two new sections dealing with the related topic of abortion. The new sections refer to "every person" who employs any method of abortion on "any woman pregnant with child, whether such child be quick or not," unless necessary to preserve the mother's life. The difference between the two new sections is that the first refers to one who acts "with intent to destroy such child, and shall thereby destroy such child before its birth," while the second deals simply with one who acts "with intent thereby to procure the miscarriage of such woman." The maximum penalty in the first case is five years in the state prison; the maximum penalty in the second case was one year in county jail or a one thousand dollar fine.[119] It is obvious from the "quick or not" phrasing of these sections that they were intended to set aside the common law's line of demarcation of criminality. It is evident from the basis used to grade penalties that they were intended to protect the life of the unborn child, for the child's death made the act susceptible to a *prison term* of five years while an unsuccessful attempt received at most a *jail sentence* of one year or a fine.

The Texas statute of 1859 is unique in its clear language and orderly arrangement. It has six sections; the first five create distinct offenses and the sixth a therapeutic exception. The first section sets a maximum penalty of five years in the penitentiary for anyone who effectively uses abortional means with the woman's consent, or ten years if consent to the act is lacking. The second section makes the furnisher of means an accomplice. The third section makes an offense of "attempt to procure abortion" if "the means used shall fail to procure an abortion." The only penalty for an unsuccessful attempt is a fine—maximum, one thousand dollars. The fourth section makes the death of the mother murder whether or not the attempt succeeds. The fifth section creates a special offense of destroying "the vitality or the life of a child, in a state of being born, and before actual birth," if the child would otherwise have been born alive. This is, as it were, anticipated infanticide, and the maximum penalty is a life term.[120] Obviously the Texans were intent on protecting both the mother's life and that of the child. The two were not put upon an equal plane, but there is a clear distinction between attempted and successful abortion. Moreover, the statute makes no mention of quickening, and uses simply "pregnant" and "abortion," not "with child," or "pregnant with a child," or "miscarriage," or any other such language.

Mr. Cyril C. Means, Jr., an attorney and advocate of the legalization of abortion, has proposed in an extensive article in the *New York Law Forum* that present abortion laws are unconstitutional. His argument is that they were enacted to protect the mother's life and that they are no longer helpful to this purpose. Therefore, they become null by the principle that when constitutional ground ceases, the constitutionality of the act also ceases. Here we need consider only the arguments Mr. Means gives for thinking that the laws were enacted to protect the mother's health, rather than the child's life.

The arguments he offers begin from the admission that common law protected the child's life. The issue, therefore, is the one we have been considering: why the statutes made abortion done before quickening a crime. He offers two bits of evidence for his thesis. One is a note to an *unenacted* proposed section of the 1829 revision of the New York statutes; the note was made by the revisers to explain the purpose of that proposed section, which the legislature did not adopt. The other is a sentence from a New Jersey court's opinion, written in 1858, explaining a New Jersey law of 1849. Since Means wants to explain the New York statute that the legislature did adopt and adopted in 1829 (effective 1830), obviously his supporting evidence is weak, but we must examine it.

The revisers of 1828 proposed two statutes pertaining to abortion, and the legislature accepted both. First, they proposed sections concerned with the abortion of a *quick* child, which they treated as a form of manslaughter. Thus they placed the life of mother and quick child on a par, and yet they introduced an explicit medical exception to preserve the mother's life.[121] But the revisers also proposed a second statute worded much like the first, dealing with abortion at any stage of pregnancy:

> Every person who shall wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.[122]

The revisers' note referred to the British abortion law of 1803, but noted that a "just and necessary" qualification was added—a reference to the therapeutic exception, which was New York's innovation in abortion statutes.

Now, Means points to a proposed section, which the legislature did not enact, that would also have made *any* surgical operation a misdemeanor unless it "was necessary for the preservation of life, or was advised by at least two physicians." The revisers explained the need for this section because young practitioners were engaging in unnecessary surgery with resultant danger to life. Means' argument is that since the revisers proposed the two sections, including the same justifying clause in both sections, the legislature must have had the same purpose in mind for the abortion section, quoted above, when they enacted it, as the revisers had for the unenacted proposed section that would have made unnecessary surgery a misdemeanor.[123]

The argument clearly is not cogent, even with regard to its immediate reference—the intent of the New York legislature of 1828. First, the revisers themselves devoted distinct sections to abortion and to unnecessary surgery, provided different provisions for punishing each (the former being assigned a maximum of one year in jail or five hundred dollars fine, and the latter being designated a misdemeanor with discretionary punishment), and justified each with different notes. Second, the legislature enacted the proposed abortion statute and rejected the other proposal. If their concern were really only danger to the patient's life, the section forbidding unnecessary surgery would have been enacted.

Means suggests that the legislature deemed this unnecessary, because "in respect of every operation except abortion, a combination of patient's caution and professional conscience sufficed to prevent unnecessary surgery."[124] But this explanation does not square with the note of the revisers, on whose wisdom Means depends so heavily:

> The rashness of many young practitioners in performing the most important surgical operations for the mere purpose of distinguishing themselves, has been a subject of much complaint, and we are advised by old and experienced surgeons, that the loss of life occasioned by the practice, is alarming.[125]

It seems reasonable to suppose that the revisers and their medical advisers knew the contemporary facts of medical life better than Means.

Even if the revisers had given the same reason for the enacted section against abortion and the rejected one against unnecessary surgery and even if the legislature had adopted both sections, that still would not prove that the intention of the legislature of 1828 in forbidding abortion before quickening was solely to safeguard women from the danger of abortion. I do not deny that such concern probably was one factor. But the revisers' notes indicate two positive facts: that the 1803 British statute was a model and that they had been advised by practicing physicians. We know that Percival's *Medical Ethics* appeared in 1803, that it condemned abortion from conception onward as an attack on human life, that it included a therapeutic exception (not found explicitly in British law until 1967), and that this book was extremely influential in forming the ethics of medical practice.[126] We also know that the Beck brothers in 1823 published the first edition of their tremendously successful *Elements of Medical Jurisprudence*, that its publication was at Albany, New York, that it treated abortion as an offense against the right to life of the child, and that it condemned on the basis of modern biological knowledge laws that discriminated between abortion before and after quickening.[127] These facts do not absolutely demonstrate that the New York legislature of 1828 intended to protect the right of the unborn to life from the time of conception. But these facts do demonstrate that this purpose could have formed at least part of the legislature's intention. We shall see additional reasons for thinking that the legislature's intention was in fact protection of life before quickening.

The other bit of evidence Means adduces is that in 1858 the New Jersey Supreme Court in upholding the conviction of a defendant, tried under the New Jersey statute of 1849, said that the purpose of that statute "was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts."[128] But this dictum fails to prove Means' point, and it fails on several distinct counts.

First, what a New Jersey court said in 1858 that a New Jersey legislature was trying to do in 1849 is not very relevant to the purposes of the New York legislature of 1828, or even to the purposes of later New Jersey legislatures.

Second, the New Jersey court in 1858 was interpreting a statute significantly different in its terms from the New York statutes of 1829. New York dealt separately with the quick child and made the death of either mother or quick child manslaughter. The statute extending to abortion prior to quickening included every attempt and made no distinction whether or not the woman died. The New Jersey statute of 1849 did not mention quickening, included every attempt, extended to aiding and assisting, and distinguished cases in which the woman dies (high misdemeanor; maximum penalty, fifteen years or one thousand dollars fine) from cases in which the woman does not die (misdemeanor; maximum penalty, seven years or five hundred dollars fine).[129] On its face this New Jersey statute appears more directly aimed at protection of the mother's life than the New York statutes seem to have been.

Third, the phrase of the New Jersey Supreme Court of 1858 must be read carefully. The court does not say that the *sole* purpose of the statute was to protect the mother, but that it was "not to prevent the procuring of abortions, so much as" to protect the mother. "Not so much as" does not mean the same as "not at all." Rather, "not so much as" means "both this and that, but more the one than the other." The case appears from the opinion to have been one in which New Jersey's peculiarly broad provision forbidding advising and assisting was crucial. Apparently, the woman did not *take* the drug and no abortion was even attempted, for the court says that the crime

> . . .as defined by the statute, consists in advising, without lawful justification, a pregnant woman to take some noxious thing, with intent to cause her miscarriage. The actual taking or swallowing of the drug, by the terms of the statute, constitutes no element of the crime.[130]

The court asserts that at common law abortion was an offense "only as it affected the life of the foetus," and then adds immediately the explanation of the statute which Means cites. The court, of course, is aware that at common law the child had to be quick. It must have appeared to the court that the large extension made by the statute was relevant to the instant case.

Fourth, the New Jersey statute of 1849 was enacted in virtue of a case decided in that year according to common law by the New Jersey Supreme Court. The defendant's indictment was quashed, because the abortion was before quickening; before quickening, the court held, there was no life to be destroyed, and so the defendant could not be convicted. The court adhered to common law and left it to the legislature to act if it believed the evil of abortion prior to quickening should be eliminated.[131] This case does not show that the 1858 court was mistaken in its understanding of the 1849 statute. It does show that "not so much" should not be read as "not at all." Further, it shows that if it had been conceded by the court in 1849 that life is present before quickening, then it would have been maintained that it is an offense to abort it, because the purpose of the common law was to protect life.

And this brings us to a fifth point. The New Jersey legislators of 1849 may not have been certain whether or not there is life in the unborn with a right to protection before quickening. The British apparently became convinced of this point in 1837, when they eliminated the distinction based on quickening from their statute. But New Jersey laws of 1872 and subsequent revisions registered the penetration of the view the Beck brothers had published in 1823, for in 1872 New Jersey extended the application of penalties contingent on the woman's death to make them contingent on the death of the "mother or child."[132] Means is trying to prove that the purpose of the laws against abortion has ceased, but he fails to take into account the manifest intent of the legislature of New Jersey in making the change. Means seems to think that legislatures never expand their intent in proportion to a growing awareness of the values at stake in criminal behavior. The acts of legislatures prove otherwise.

In attempting to construct his argument, Means was confronted by one massive obstacle. In 1869 the New York legislature passed a statute making an abortional act at any stage of pregnancy manslaughter in the second degree if either the child or the woman died as a result of the act.[133] Means himself sets out the evidence that this legislation followed a period of considerable public concern about abortion, including an 1867 resolution of the New York State Medical Society labeling abortion "from the first moment of conception" murder, and asking for legislative and other action to curb the practice.[134] He admits that the legislature acted in response to the Medical Society, but he denies that the legislature actually intended to accept the view that the unborn child is a human being, and a potential victim of manslaughter, from conception.[135]

What support has Means for this position? Only this: in a brief filed in *Evans v. People* in 1872 an Assistant District Attorney said that "manslaughter" in the 1869 act was only an arbitrary name for the offense defined by the statute, nothing more. Evans, as Means narrates, was tried under the 1869 act on a charge of assault with intent to commit manslaughter in the second degree. Since the twin fetuses were not proved to have quickened at the time of the assault, the defense argued on appeal that there was no living child—*man* to slaughter—thus no manslaughter. In this argument, the position and intent of the 1869 act was put to the test. The court ruled *for* the defendant.[136]

The implications are two. First, according to the court, the argument of the Assistant District Attorney was mistaken—the legislature in 1869 meant by "manslaughter" precisely to refer to a crime against the right of a living person to life. Second, the court disagreed with the legislature not about the *meaning* of "manslaughter" but about whether there is a man to slaughter prior to quickening. The court's position is important in its own right, but so far as legislative intent is concerned it tends to prove precisely what Means denies: that the 1869 legislature did want to protect the child's life from conception, for the reason why the Medical Society said in 1867 it should be protected.

The opinion of the court is such a remarkable document that it deserves to be quoted at some length:

> Although there may be life before quickening, all the authorities agree that a child is not "quick" until the mother has felt the child alive within her. "Quick" is synonymous with "living," and both are the opposite of "dead." The woman is not pregnant with a living child until the child has become quick. If the child is a living child from the instant of conception, then all the authorities, medical and legal, are sadly at fault in their attempts to distinguish between mere pregnancy and pregnancy with a quick child, and legislators have been laboring under the same hallucination in legislating upon the subject, for all the acts passed in reference to abortion in this country and in England recognize the fact that the child does "quicken," that is, become endowed with life, at a certain period, longer or shorter, after conception, and that there is a period during gestation when, although there may be embryo life in the foetus, there is no living child.[137]

The court, of course, is in error in its references to "all authorities" and also to the British laws, which had abandoned the quickening distinction thirty-five years previously. Perhaps the court simply disagreed with the legislature's policy, but the decision of course does not say so. It does evidence anxiety about all the old medical and legal authorities which would have to be discredited if quickening were abandoned as a significant criterion.

The reaction of the 1872 legislature to this challenge is significant. It adopted a new act, in four sections, designed to avoid the obstacles set by the 1872 court decision. The first section dealt with abortional acts on "any woman with child" which resulted in the death of either; the crime was designated an unnamed felony with a maximum punishment of twenty years. Here the legislature manifested its determination to do its will despite the court. The word "manslaughter" is conceded to the court, and attempts are dealt with in a distinct section. The second section parallels the first, except that the agent is the woman herself who is aborted; her act or submission also is a felony, if the child dies, with a maximum penalty of ten years. The third section deals with all acts intended to effect miscarriage, whatever the result, and carries a maximum jail sentence of three years. The fourth section concerns more remote cooperation—supplying means—and cases where the woman is not pregnant; the offense is a misdemeanor with a maximum penalty of one year in jail and a one thousand dollar fine.[138]

Means thinks that the legislature of 1872 did not intend to include pre-quickening abortion in section one, because that section refers to "any woman with child"; he thinks that if this did not mean "any woman with quickened child," the third section would be pointless.[139] However, the third section covers ineffective attempts. Moreover, there would hardly have been any reason for the legislature to omit "manslaughter" or an explicit reference to "quickening" in section one if that would have expressed its mind.

What all this discussion of New York legislation shows is that the legislature did recognize the right of the unborn to life, and did try to protect it. The acts of 1869 and 1872 surely aimed to put the life of the child from conception on a par with the life of its mother except in cases of a direct conflict, where therapeutic abortion was still permitted. Earlier legislation did not go so far, but it seems clear that even in 1829 one purpose of the legislature was to extend some protection to embryonic life between conception and quickening. The issue in *Evans v. People* was *not* whether the living child should be protected, but whether there was a living child or only something called "embryo life" prior to quickening. Despite the anxiety of the New York Supreme Court about the fearful consequences of discrediting legal and medical authorities if quickening were abandoned as a significant dividing line, it is worth noting that although a number of statutes still use that event as a condition for increasing punishment, no one in the current debate takes the moment of quickening seriously as a line dividing the non-living from the living.

In 1881, the New York legislature again reworked the statutes on abortion. Quickening was restored, and remained in New York law until 1965 as a significant condition. Abortion causing either the child's or the mother's death after quickening became first degree manslaughter. The woman's own participation was second degree manslaughter if the quickened child died. Attempted abortion at any stage of pregnancy and the woman's own participation in it were made punishable by a maximum four-year prison term. Those providing abortifacients for unlawful use—a therapeutic excuse continued to be recognized in the 1881 law—were made guilty of a felony.[140] Means thinks that this revision marked the end of the effort of a doctrinaire clique "to innovate a legislative recognition of their metaphysical notion that an hour-old zygote is a 'living child' and therefore a 'man.'"[141]

Certainly, the 1881 revision represents an apparent step backward in the recognition of the right to life of the unborn. But, once more, it is by no means clear what the legislature had in mind. As we saw in chapter four, there was considerable organized opposition to abortion around 1870, including members of the Protestant clergy of New York State and also including the American Medical Association.[142] Thus the laws passed in 1869 and 1872 were not the product of the efforts of a fanatical minority.

The law of 1881 implies a continuing commitment to the protection of human life before birth in those cases in which there was common agreement that it is surely present. The provisions regarding attempts at any stage of pregnancy are like similar provisions in the law of 1829. Probably the revision of 1881 represented some sort of practical compromise.

One fact important to notice is that New York statutes since 1845 have forbidden the woman at any stage of pregnancy to abort herself or to submit to an abortion. Means notes this fact and observes that the 1881 statutes did not mitigate, but actually intensified, the gravity of the offense.[143] But he claims that these provisions are dead letters, "that no such woman ever has been, or is ever likely to be, prosecuted."[144] How he knows this, he does not say. But even if it is true that the statutes of New York and twelve or fourteen other states applying to the woman herself are not enforced, they do provide some further evidence of concern for the unborn child.

It is worth noting that in the statutes of 1881 New York was not inventing an altogether new pattern of legislation forbidding abortion. The 1881 revision essentially is a reversion to pre-1869 concepts, and has the same basic pattern as the enactments of 1829. This very influential arrangement distinguished between abortion before and after quickening, included all attempts in the section extending to the whole of pregnancy, while it punished equally the death of mother or child consequent upon abortion involving a quickened fetus. Statutes apparently based on the New York 1829 legislation were enacted in at least seven jurisdictions before 1881 when New York itself reverted to this arrangement: Ohio (1834), Michigan (1846), Washington Territory (1854), Wisconsin (1856), Pennsylvania (1860), Florida (1868), and Georgia (1876).[145]

These laws contain an anomaly that Means himself notes and does not satisfactorily explain. In the section dealing with abortion after quickening, the death of either mother or baby is the same crime (usually manslaughter); in the section dealing with abortion before quickening, nothing is said about the death of either. What about the pre-quickening abortion from which the mother died? If the common-law position held, the act would have been murder in such a case, but then the abortionist would be punished more severely for the death of the woman if she were not quick than if she were. If the statute displaced the common law position, then the abortionist who killed a woman would have been subject to no more serious penalty than one who gave an ineffective and harmless drug.[146]

I do not know what to make of the legal position resulting from these provisions,[147] which leave the legal protection of the mother's and child's life equally out of consideration or bring both equally into consideration. I think it obvious, however, that such a pattern does not testify to a primary concern with the life and health of the mother. The contrast with the New Jersey statute of 1849 is as sharp as it could possibly be, for there quickening was ignored, while any sort of attempt leading to the mother's death was, as we have seen, more severely punished.[148]

Before 1860, Massachusetts (1845), Vermont (1846), and New Hampshire (1848) were the only states that had a law like that of New Jersey (1849),[149] and probably these four states should be considered to have enacted statutes more for the protection of the mother than for extending protection of fetal life to the period prior to quickening. In 1965, twenty states and the District of Columbia indicated in their abortion statutes what the penalty was to be if the woman died, but nearly half of these still more or less followed the New York pattern of 1829, and only six simply provided for increased punishment if the woman should die (the early Massachusetts pattern), while seven merely declared what probably would have been the case anyway—that such a death made the act murder.[150]

Clearly this history is incompatible with Means' thesis. The rule of common law by which an abortionist acting at any stage of pregnancy was guilty of murder if the woman died gave great protection to the woman's life, without evidencing a like regard for the life of the fetus, especially prior to quickening. If the legislators, in passing statutes, were primarily or even on the whole significantly moved by concern to protect the mother's life and health from unsafe abortion, as Means contends, surely those legislators would have maintained an explicit and severe penalty in all cases in which the mother died in consequence of the operation.

Perhaps the penalty would not have been that for murder, because legislators eager to protect women from unsafe abortion would perhaps have been more concerned to secure convictions in a large number of cases than to impose maximum penalties in a smaller number of cases. But the clear provisions of common law which so firmly protected the mother could hardly have been ignored by legislators except for one reason—namely, that they wrote these laws more to protect the unborn child than to protect the mother.

Means brushes aside the anomaly involved in statutes that reduced from murder to manslaughter the crime involved in abortion followed by the mother's death if her child had already quickened, that failed even to mention what crime was involved if the mother died of an abortion induced prior to quickening, that punished the mother herself or another, that punished the physician and the non-physician alike, and yet that—if Means' argument were sound—extended the provisions of common law prohibiting abortion not for the sake of the life of the unborn but only for the sake of the protection of women from the dangers of abortion. This anomaly, more than anything else, demonstrates the falsity of Means' theory.

From the entire preceding consideration of Means' thesis, it is clear that in the nineteenth century, as today, there were conflicting views of the nature and seriousness of abortion prior to quickening. One view was that it is a violation of a person's right to life, and this view was reflected in laws, such as the New York statutes of 1869 and 1872. The other view was that there is no person with a right to life before quickening. This view was reflected, probably on a basis of compromise with the other position, in all the statutes that used quickening as an important dividing line. Yet it is a mistake to conclude that such statutes, when they forbade pre-quickening abortion, were solely concerned with the protection of the woman's life and health. They also were at least partly intended to protect embryonic life. Even if such life were not a "human being" and a "living child," it deserved some respect and protection insofar as it was a potential human being—one on the way.

Evidence for the existence of this point of view is found, first of all, in our criticism of Means' interpretation of the New York statutes of 1829. That legislation, which was so influential, was intended neither solely nor even primarily to protect women's life and health. Rather, it extended some protection to the pre-quick fetus, but not nearly the protection extended to the quickened fetus.

The ruling of the New York Supreme Court, in the case of *Evans v. People,* throws considerable light upon the mentality of those who regarded life before quickening as a reality of some significance, yet somewhat less important than the life of a "living child" after quickening:

> There was no evidence given upon the trial as to the commencement of life in the child or the character or degree of vitality at the different periods of gestation. But it may be assumed that the claim of the physiologist is true, that life exists from the first moment of conception. And it has been well settled, from a very early period, that certain civil rights attach to the child from the first, and that legal consequences result from pregnancy before actual quickening. (1 Bl. Com., 129.) But it is life in embryo, and recognized in the interests of humanity in some cases, and in others in the interest of the child thereafter to be born, and in respect to succession of estates.
>
> But until the period of quickening there is no evidence of life; and whatever may be said of the foetus, the law has fixed upon this period of gestation as the time when the child is endowed with life, and for the reason that the foetal movements are the first clearly marked and well defined evidences of life. (Dean's Med. Jur., 129.)[151]

The court's observations concerning lack of evidence of life before quickening and well defined evidences of life after quickening touch on a fact that undoubtedly goes far to explain the significance that the law for so long attached to quickening. Statutes following the pattern of New York's 1829 laws included for practical purposes two extensions of the common law in one provision: an extension to cover abortion during the period from conception to quickening and an extension to cover attempts at all stages of pregnancy.

Objectively, an effective abortional act in the third month of pregnancy and an ineffective attempt in the sixth month are very different. But from a legal point of view, the two are very similar, because it is almost as impossible to prove that the abortional act caused the death of the not-yet-quick fetus (it might already have been dead) as it is impossible to prove that an ineffective attempt caused death.

If the life and health of the mother had been the prime consideration, a utilitarian approach to the problem would have dictated that the punishment be equal regardless of whether the unborn were killed. But since the laws were intended to protect the unborn, whether a particular abortional act certainly caused death or not became an important issue, just as the law makes an important distinction between an attempt to murder and an actual murder. If the problem of evidence is considered, it makes sense to forbid abortion prior to quickening by prohibiting attempts at any stage of pregnancy.

Still, it will be objected that such an arrangement also would make sense if the statutes had a purpose other than the protection of life before birth. We have already argued that protection of the mother was not the primary concern of the many statutes based on the pattern of the New York laws of 1829. Others have suggested that the laws against abortion were "moral legislation" in the narrow sense—legislation to suppress sexual activity—or demographic measures in a period when an expanding population was socially advantageous.[152]

Both of these suggestions are implausible to the extent that abortion statutes were not simply anti-contraceptive, although some of them may have dealt with both matters, for example, in regulating the supplying of poisons and drugs. Moreover, it is anachronistic to read the twentieth-century urge to shape public policy by sociology into the acts of nineteenth-century legislators and judges who had not even caught up with eighteenth-century developments in such sciences as physiology and embryology.

Little evidence is cited for thinking either repression of sexual activity or demographic considerations played a role in shaping nineteenth-century anti-abortion statutes. However, sentences from two state supreme court decisions—one from Pennsylvania, the other from Kentucky—have been cited.

In *Mills v. Commonwealth* (1850), Justice Coulter of Pennsylvania decided that abortion before quickening was a common law crime.[153] Means observes that this opinion was a mistake, and his observation is surely correct. Only one other state followed the Pennsylvania precedent, while the predominant view remained that the common law forbade abortion only after quickening.[154] In this case the court said that abortion is criminal: "[b]ecause it interferes with and violates the mysteries of nature in that process by which the human race is propagated and continued." The court also said: "It is not the murder of a living child which constitutes the offence, but the destruction of gestation by wicked means and against nature."

Does this show a disposition to enact by judicial fiat a public policy favoring population expansion? No. The two quoted phrases are related to two problems the court faced in upholding the indictment. One was that it said that Mills had aborted the *woman*, not that he had aborted the *child*. The court solved that, in its rather flowery phrase about "mysteries of nature," by saying that pregnancy is a process, and that abortion interrupts it. This is an offense because pregnancy is a process of human-life-beginning; one can say the woman was aborted without straining language.

The other problem was that the indictment did not say the woman was "quick"; it only said she was "pregnant and big with child." The court handled this objection by asserting (erroneously) that common law did not require that the child be quick. Thus the comment that abortion was not murder was inserted. But then the court added:

> The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated. The allegation in this indictment was therefore sufficient, to wit, "that she was then and there pregnant and big with child." By the well settled and established doctrine of the common law, the civil rights of an infant *in ventre sa mere* are fully protected at all periods after conception; 3 *Coke's Institutes*.

Justice Coulter and his colleagues may not have been masters of the common law, but it is clear what they meant to do. The reference to Coke, whatever its inadequacy to support the position taken, makes that position clear. Distinguishing between the "living child" after quickening, which they thought could be *murdered*, and "embryo life" before quickening, which they thought could be criminally aborted, the Pennsylvania Supreme Court was trying to extend legal protection to that embryo life, relying on the analogy of the common law's protection of the *civil rights of the infant at all periods after conception*.

It is interesting to note that the Supreme Court of New York, in *Evans v. People* summarized and agreed with the opinion in *Mills v. Commonwealth* so far as the distinction between "embryo life" and the "living child" is concerned.[155] The New York court did not assert nor did it deny that there is, from conception, a life to be protected. All the New York court said was that prior to quickening there was no man to slaughter, and since that was the charge on which Evans had been indicted, his conviction was reversed.

This distinction, stated explicitly in court decisions, throws considerable light on what was surely part of the underlying rationale of statutes in the pattern of New York's 1829 laws. Some protection was extended to "embryo life" prior to quickening, but greater protection was given to the "quick child." The two concepts do not make much sense from an objective viewpoint; there is embryonic life from conception to birth, and it is or is not a "living child" depending upon one's theory of personality. But the law was not working on the plane of objective analysis. "Embryo life" was the legal translation of the scientific facts which had led the Beck brothers to condemn abortion laws that used quickening as a dividing line.[156] The "living child" was the legal entity common law had always known and that legal conservatism clung to as if it were a Linus-blanket.

In *Mitchell v. Commonwealth* (1879) the Kentucky Supreme Court ruled that abortion prior to quickening is not a common law crime.[157] The court said:

> In the interest of good morals and for the preservation of society, the law should punish abortions and miscarriages, wilfully produced, at any time during the period of gestation.

Does this dictum reveal an obsession on the court's part with "morals" in the narrow sense? Not at all, for the court proceeded immediately:

> That the child shall be considered in existence from the moment of conception for the protection of its rights of property, and yet not in existence, until four or five months after the inception of its being, to the extent that it is a crime to destroy it, presents an anomaly in the law that ought to be provided against by the law-making department of the government.

Whether or not this opinion was an influence, it is interesting to note that Kentucky did subsequently enact statutes dealing in distinct sections with abortion attempts (maximum penalty, ten years in prison and one thousand dollar fine), the killing of an unborn child "whether before or after quickening time" (maximum penalty, twenty-one years in the penitentiary), and the killing of the woman in an attempted abortion, successful or not and at any stage (maximum penalty, that for murder or manslaughter, as the facts indicate).[158]

A possible source of the Kentucky legislation was the Illinois statute of 1867. Illinois enacted one of the earliest American statutes against abortion, in 1827, but it was limited to attempts involving poisons and drugs. The 1867 law dealt with other methods, successful or not, set ten years in the penitentiary as the maximum penalty, in a distinct section classed the offender as guilty of murder if the woman died, and—like all Illinois statutes—made no mention of quickening.[159] Obviously, this statute aimed to protect fetal life from conception on, and set a high value on it.

Kentucky may also have been influenced by the Tennessee statute of 1883, which expressly excluded quickening and increased penalties only on the basis of whether or not the child was actually destroyed before birth.[160]

Two states obviously learned something from the 1872 New York collision between court and legislature. Minnesota enacted a four-section statute in 1873 closely following the New York 1872 statute.[161] Nebraska in 1873 adopted two statutes, one of which penalized abortional attempts that led to no death, and the other punished equally ones that led to the death of the mother or to that of the unborn child, which is nevertheless cautiously referred to as "a vitalized embryo, or foetus, at any stage of utero gestation."[162] As far as I know this is the only occurrence of this language in any statute. It clearly excludes quickening, extends protection to the unborn at all stages of pregnancy, and carefully avoids using language that would open the statute to treatment by the courts as the New York law of 1869 was dealt with in the *Evans* opinion.

Modern courts have explained the purpose behind various abortion statutes in a manner compatible with my thesis that they were intended to protect developing human life from conception until birth.[163] Justice Francis, in a concurring opinion of the New Jersey Supreme Court, said that if the 1858 decision in *State v. Murphy* meant that

> . . . the only purpose of the 1849 act was to protect the life and health of the mother, I disagree. There is nothing in the legislative language to support that idea. It seems to me there were two objectives, of at least equal importance. One was to provide greater protection for the child *in utero* than was given under the common law. To accomplish this, the safeguard against abortion was moved backward from the time when the child became quick, to the moment of conception.[164]

In his opinion this and subsequent changes in New Jersey abortion laws implied the legal recognition of a separate entity:

> In my judgment, the most important consequence of the statute is the legislative recognition and sequential incorporation in the law of the principle that the child as a legal entity begins at conception; as of that time it has a legal existence as a separate entity, as distinguished from a mere part of its mother's body.[165]

In view of our previous discussion, this opinion is essentially correct, though somewhat oversimplified. The statute laws on abortion extended the protection of unborn *life* to conception, and clearly considered that life as something more than any other mere bit of maternal tissue. Still, many of the statutes presupposed a distinction between the "quick child," which was treated as a separate legal entity—as a special class of legal person—and "embryo life," which was not a legal entity or unborn *person*. "Embryo life" was regarded as something *becoming a person*, and deserving of protection in view of the inviolability of the life which it would come to be; *rights* were not assigned to "embryo life," but care was to be given it in view of the "quick child" it would become.

Many other statutes, such as the New Jersey statute of 1872, which provided the same penalty if either the woman *or the child* died as a result of an attempt at abortion at any stage of pregnancy, do seem to have recognized the developing individual as an unborn person with a right to life from conception onward. It is worth noting that (as of 1965) only ten states still used quickening as a basis for determining the penalty for abortion or attempted abortion, and no state lacked a law prohibiting abortion at every stage of pregnancy.[166]

In the famous case of *Rex v. Bourne*, which we discussed in chapter five, Justice Macnaghten summed up the rationale of the British statute, which was the model of American statutes:

> The law of this land has always held human life to be sacred, and the protection that the law gives to human life it extends also to the unborn child in the womb. The unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother.[167]

The report of the British Inter-Departmental Committee on Abortion (1939) stated:

> Undoubtedly, the law upon the subject has been most markedly influenced by the teaching of the Church. The sanctity of human life from its very beginning has been strongly emphasised in all Christian teaching; even the unborn life must not be deliberately taken.[168]

The Committee also believed that concern to maintain the continuity of the state may have been another factor.

Glanville Williams, a proponent of legalization of abortion, correctly states the intention of the laws forbidding it:

> At present both English law and the law of the great majority of the United States regard any interference with pregnancy, however early it may take place, as criminal, unless for therapeutic reasons. The fetus is a human life to be protected by the criminal law from the moment when the ovum is fertilized.[169]

The American Law Institute's commentary on its proposed statute also conflicts with Means:

> Abortion is opposed by some on the ground of physical or psychic danger to the woman, or as an inhibitor of population growth. But it is clear that the main factor accounting for laws against abortion is ethical or religious objection. As the fetus develops to the point where it is recognizably human in form (4–6 weeks), or manifests life by movement perceptible to the mother ("quickening": 14–20 weeks), or becomes "viable," i.e., capable of surviving though born prematurely (24–28 weeks), it increasingly evokes in the greater portion of mankind a feeling of sympathy as with a fellow human being, so that its destruction comes to be regarded by many as morally equivalent to murder.[170]

Unfortunately, this normal sympathy seems to be decreasing in advocates of abortion on demand.

The general trend in abortion legislation, until the last few years, was increasingly to recognize and insist upon respect for the life of the unborn child. This trend paralleled the trend in property law to recognize the factual ground of the old civil-law fiction and the trend in tort law to recognize rights vested in the unborn prior to birth, rights that could be vindicated at law in many states even if the child were never born alive.

In reviewing tort law, we saw that the first cases that recognized rights in the unborn—*Bonbrest* for personal injuries and *Verkennes* for wrongful death—limited themselves to pushing the line from viable birth back to viability; subsequent decisions went further. In criminal law of homicide, one decision took the step of setting aside old criteria of birth—for example, whether the infant breathed or whether the umbilical cord was cut—and took the position that *homicide* can be committed before the child is born, provided it is viable. This case was *People v. Chevez*, decided in California in 1947.[171] The court held:

> There is no sound reason why an infant should not be considered a human being when born or removed from the body of its mother, when it has reached that stage of development where it is capable of living an independent life as a separate being, and where in the natural course of events it will so live if given normal and reasonable care. It should equally be held that a viable child in the process of being born is a human being within the meaning of homicide statutes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby and where in the natural course of events a birth which is already started would naturally be successfully completed. While the question of whether death by criminal means has resulted while the process of birth was being carried out, or shortly thereafter, may present difficult questions of fact, those questions should be met and decided on the basis of whether or not a living baby with the natural possibility and probability of growth and development was being born, rather than on any hard and fast technical rule establishing a legal fiction that the infant being born was not a human being because some part of the process of birth had not been fully completed.

This case is significant because it was an application not of abortion statutes, but of the same homicide statutes that protect adult lives. If there were not at present so strong a movement to legalize the killing of the unborn, one could predict that the *Chevez* decision would be the first step in a development in the field of criminal law of recognition of the rights of the unborn parallel to the development initiated by *Bonbrest* and *Verkennes* in the law of torts.

Today it is difficult to foresee what direction courts will take. One attempt has been made to challenge the new California law by means of a civil suit brought by a husband against a hospital to prevent the abortion of his wife. The suit, *O'Beirne v. Kaiser Memorial Hospital*, could have marked a significant advance in the legal right of the unborn to life, because plaintiff argued that the abortion would violate his paternal rights and the right of the child to be born. However, the case was decided for the defendant, and this decision was affirmed by peremptory decision of the California Supreme Court.[172]

Still, this decision does not set a precedent against the position that the unborn child has a constitutional right to life. Although there was no written opinion published, there is evidence in the form of a letter written by the trial judge indicating that the decision against the plaintiff was made on the basis that the abortion was necessary to safeguard the woman's life.[173]

One final argument that criminal law recognizes no right to life prior to quickening is offered by Means. He points out that New York legislatures in 1828, 1881, 1910 and 1967 maintained the common law rule according to which reprieve was granted to a woman to be executed only if she were "quick with child." Thus it seems that these legislatures recognized a separate life to be legally respected only after quickening.[174] Conceptually, the argument is sound, but in reality it lacks force. Executions of women who have conceived but are not yet quick are highly unlikely in recent years, for there have been few executions, fewer still of females, and these only after months or years of delays. The continuation of the old rule in 1967 would therefore seem to be a matter of legislative inertia rather than of policy, and the same may be true of the revisions of 1881 and 1910. The minority report of the 1969 New York Governor's Commission on abortion asserted:

> We are aware of no case of the execution of a pregnant woman in this state. We cannot conceive of such a case occurring today.[175]

There is some reason to doubt whether pregnant women were executed even under common law, for a jury of twelve women decided whether to honor a claim to reprieve on this ground, and the reported practice was to grant reprieve if there were "any colour to support a sparing verdict."[176] Some modern state codes of criminal procedure have abolished the quickening distinction from the provision for reprieve of a pregnant woman.[177]

"Wrongful Life?"

A small number of recent tort cases deserve separate consideration because they raise a wholly new question: whether the child who is born under disadvantageous conditions has a legal right to compensation for "wrongful life"—for having been procreated and permitted to be born.

The first of these cases, *Zepeda v. Zepeda,* involved illegitimacy.[178] The suit was brought on behalf of the child against his father, who had fraudulently promised marriage to the baby's mother though he already was married to someone else. The child asked for damages to compensate for the fact and effects of his illegitimate birth.

The opinion of the Illinois Appellate Court, written by Presiding Justice Dempsey, was that the child had been tortiously wronged. Reviewing the history of tort law, the court observed:

> The law of torts has been hesitant in recognizing what medical science has long known, that life begins at the moment of conception, and what theology has longer taught, that from the moment of conception every human being has the rights of a human person.

However, the court did not rest its opinion that the child had been wronged so much on the idea that it was a person with rights at conception as on the concept that even prior to its conception there was a "conditional prospective liability" toward it. Thus the court maintained:

> If the plaintiff was conceived before the completion of the act, he became a living, human organism concurrently with the wrongful act. If his conception took place after the act, he was a potential being with essential reality at the time of the act. The seed was planted, the life process was started, life ensued and birth followed.

> The defendant's wrongful act simultaneously procreated the being whom it injured.
>
> In neither event was the plaintiff a "person" as that word has been historically understood in the law of torts. We do not think this is too material for we are not concerned with some abstract ontological proposition as to the instant a human entity becomes a person. The plaintiff is a person now and he was a potential person with full capacity for independent existence at the time of the original wrong. As he developed biologically from potentiality to reality the wrong developed too. It progressed as did he, from essence to existence. When he became a person the nature of the wrong became fixed. From a moral wrong and a criminal act against the public, it became a legal wrong and a tortious act against the individual.

Although the court recognized that the "living, human organism" begins at conception, and although it held that a child is able to recover for injuries done before birth, it refused to regard the plaintiff as a "person" in tort law and suggested that during pregnancy there is development from a potential to an actual person. This view is not unlike that of those who accorded "embryo life" to the unborn while denying that they are persons.

The court, despite its finding that the child had been wronged, refused to allow his claim. The difficulty in granting recovery was located in the nature of the complaint "that he was born and that he is." To admit this complaint "means the creation of a new tort: a cause of action for wrongful life." If admitted in this case, the way would be open for suits not only by illegitimates against their fathers, but also by every individual whose birth was in some regard less fortunate than normal. The court therefore decided that the legislature, not the court, was the proper body to admit and limit such causes of action, if they were to be allowed at all.

Zepeda does not prove a great deal with regard to the issue as to whether the unborn should be considered persons having rights. There is some recognition of the facts of prenatal life, a refusal to classify the unborn as persons, an admission that one can be legally wronged from conception onward, and a refusal to give legal approval for a claimed right not to exist.

Williams v. State, a subsequent New York case, raised the issue again in a slightly different form. A mental patient in a state institution was raped, became pregnant, and gave birth to a baby girl. The child's maternal grandfather sued on her behalf, because the negligence of the State Hospital resulted in her "being conceived, being born and being born out of wedlock to a mentally deficient mother." The Court of Claims decided that the case should not be dismissed, that recovery for damages inflicted "at conception" should be allowed. In this opinion the court undertook the step Illinois had refused to take in *Zepeda*. But, significantly, Judge Squire declined "to approve the appellation: 'a cause of action for wrongful life.'"[179]

Despite this caution and the fact that Judge Squire's opinion made no mention of abortion, it immediately led to speculation that the decision would establish a duty to abort on eugenic grounds, in rape cases, and possibly in many other cases. The plaintiff's attorney said that an abortion had been sought and refused and added: "It was this failure to abort and therefore to mitigate damages that lies at the heart of the case."[180]

The State appealed the Court of Claims ruling. The Appellate Division reversed the original decision, as lacking reasonable grounds. The State does not have a duty to one not yet conceived, and so was not negligent prior to conception. Moreover, the damages asked for cannot be ascertained:

> In essence, and regardless of the verbiage of the claim above quoted, the damages asserted rest upon the very fact of conception and would have to comprehend the infirmities inherent in claimant's situation as against the alternative of a void, if nonbirth and nonexistence may thus be expressed; and could not, without incursion into the metaphysical, be measured against the hypothesis of a child or imagined entity in some way identifiable with claimant but of normal and lawful parentage and possessed of normal or average advantages.[181]

This decision makes an extremely important point: that an individual cannot legally claim to have been wrongfully given life, since the alternative for him is *not being at all* rather than being in an imaginary better condition. One takes his life as he finds it—a counsel of realism!

A final appeal to the New York Court of Appeals resulted in affirmation of the Appellate Division's judgment. The Court of Appeals held:

> Being born under one set of circumstance rather than another or to one pair of parents rather than another is not a suable wrong that is cognizable in court.[182]

Shortly after *Williams* finally failed (December 1966), *Gleitman v. Cosgrove* was decided by the Supreme Court of New Jersey.[183] In 1959 Mrs. Gleitman had a baby, Jeffrey, after suffering an attack of German measles in early pregnancy. She asserted and the defendant physician denied that no warning was given of the possible effect on the child. Jeffrey was born substantially injured in sight, hearing, and capacity for speech. The Gleitmans sued, not on the basis that better treatment would have ameliorated the damage, but rather on the assumption that a legal abortion could have been obtained somewhere, eliminating Jeffrey and his problems. The trial judge dismissed the suit as far as Jeffrey was concerned because the defendants were not responsible for his condition, and as far as the parents were concerned because New Jersey law did not seem to him to admit abortion in such cases.

The New Jersey Supreme Court divided four to three against allowing the parents' action and five to two against allowing Jeffrey's action. There was a separate concurring opinion and two distinct dissenting opinions, one by the Chief Justice who would have allowed the parents' suit while affirming the dismissal of the child's.

The opinion of the court, written by Justice Proctor, dismissed the complaint on behalf of Jeffrey on the same ground that the New York Appellate Division used in *Williams*:

> The infant plaintiff would have us measure the difference between his life with defects against the utter void of non-existence, but it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the non-existence of life itself.

It is important to note that Chief Justice Weintraub, in his partial dissent from the majority opinion, agreed with the majority on this point:

> Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so.

This argument is extremely important, because it applies equally against proposals to legalize eugenic abortion in the interests of the fetus. In effect, the New Jersey decision clarifies the precedent opinions in *Zepeda* and *Williams* by pointing up the logical difficulty in the view that possibly defective infants should be aborted in their own interest.

In regard to the parents' claim, the court held it not actionable for two reasons. First, the human values of parenthood, even in this situation, cannot be measured against its disadvantages. Second, even if the damages could be measured, "the right of their child to live is greater than and precludes their right not to endure emotional and financial injury." To reach this conclusion, which directly asserts the right of the unborn child to life, the court formulated the following argument, which proceeds from the value of human life to the right to life, a right held to be superior to the claim of the parents:

> It is basic to the human condition to seek life and hold on to it however heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all. "For the living there is hope, but for the dead there is none." Theocritus. See Ryan (M.D.), "Humane Abortion Laws and the Health Needs of Society," 17 *West. Res. L. Rev.* 424, 428-430 (1965); and for a recent statement on "the rights of the fetus" see Conniff, "The World of the Unborn," *New York Times*, January 8, 1967, Section 6 (Magazine), pp. 97-98.
>
> The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life such that denial of the opportunity to terminate the existence of a defective child in embryo can support a cause for action. Examples of famous persons who have had great achievement despite physical defects come readily to mind, and many of us can think of examples close to home. A child need not be perfect to have a worthwhile life.
>
> We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. It may have been easier for the mother and less

> expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life to support a remedy in tort. *Cf.* Jonathan Swift, "A Modest Proposal" in *Gulliver's Travels and Other Writings*, 488-496 (*Modern Library ed.* 1958).[184]

This opinion, while it strongly argued against the rationale of eugenic abortion, did not hold that eugenic abortion is criminal under New Jersey law. In effect, the majority of the court agreed that even if it is not criminal, it is not the sort of behavior the state should make a policy of, by enforcing damages when it is not performed.

Justices Jacobs and Schettino, in their dissent, embraced the theory of the plaintiff's suit completely. They believed that an abortion should have been performed, that New Jersey law would have permitted it, and that the state should make a policy of eugenic abortion.

Justice Francis, in a concurring opinion, argued that abortion would have been illegal in New Jersey. The law forbids abortion "without lawful justification" and does not say what that might be. Justice Francis argued that in view of the history of abortion laws and their purpose as a protection of the right of the unborn to life, this phrase could reasonably be taken to refer only to the cases in which abortion was necessary to save the mother's life.

Chief Justice Weintraub, in his partial dissent, argued that "lawful justification" in the New Jersey statute did or should include eugenic indication. He also attacked the phrase as vague and suggested that it might be unconstitutionally vague, since it does not clearly tell people just what the law forbids them to do. On this basis, he held that the Gleitmans may have been tortiously injured in not being given the chance to have Jeffrey aborted. But Justice Weintraub joined the majority in rejecting a claim for "wrongful life": "To recognize a right not to be born is to enter an area in which no one could find his way."

A case similar to *Gleitman* has been tried in New York. On trial, the infant and parents in *Stewart v. Long Island College Hospital* were awarded damages totaling 110,001 dollars by the jury. However, the trial judge set aside the 100,000 dollars awarded for the child on the same grounds accepted by the New Jersey court, including Chief Justice Weintraub, in the *Gleitman* case. In *Stewart*, Judge Beckinella held that "a plaintiff has no remedy against a defendant whose offense is that he failed to consign the plaintiff to oblivion." Damages were allowed to the parents on the theory that they had proved a case of medical malpractice, in that they were not informed of a division among members of the hospital abortion board, and that this information might have led them to seek medical advice elsewhere. Apparently, however, the "elsewhere" would have had to be outside New York State, since Judge Beckinella did not accept the view that New York law permitted abortion except to preserve life.[185] As of August 1969, appeals by plaintiff for damages denied and by defendant against damages awarded are pending final disposition on appeal.

These four "wrongful life" cases merit attention for two reasons. First, the position seems to be established that tort law is not able to recognize a person's right *not to be.* Second, there may be other aspects of a complex situation that merit and will receive a legal remedy. These should not be confused with a right not to be. I see no reason why in *Zepeda,* for example, the child's claim against his father could not have been admitted. The issue was not properly whether the child's life was wrongful, but whether the reprehensible behavior of the man did not fall short of enforceable standards of responsibility toward those whom he is willing to procreate. The possible child is not a mere non-entity, but a potential reality toward which there are at least moral responsibilities.

"Person"—Consistency in the Law

Should the law in all its branches be consistent in what it regards as a *person*? Or may it reasonably regard as a person in property law what is not a person in tort law or in criminal law?

The issue will be sharpened by reference to two recent articles in legal journals. In one, "The Law of Prenatal Injuries," Mr. John L. Hay observes that Holmes' dictum in *Dietrich* that the unborn child is part of its mother was reversed partly because it denied what was known shortly after as a palpable fact. However, it took nearly half a century for this fact to be generally recognized. He then adds: "Most courts since 1946 have classified viable, unborn infants as legally persons by judicial statement of the fact."[186]

One reason for this is that courts have argued from the legal status of the unborn in property law and criminal law to the conclusion that they should be considered "in being" for tort law as well. Mr. Hay points out that not all states using this analogy have been consistent in it, for in property law it was essential that the child be liveborn, while the analogy has been used in tort law in cases involving wrongful death. At this point Hay states his own view, with admirable clarity:

> Whether or not this analogy between property and criminal law and the torts field should be drawn is, of course, up to each individual court. Many of the recent cases have implied that a person should be characterized as "in being" from the same particular time each time a definition of "being" is needed. This is not so. [As Cook observes:]
>
> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against."
>
> Each court should be free to define the point in time at which a person is "in being" differently for tort law than for property law or criminal law, if public

policy, statutory enactment or well-reasoned precedent requires it. [*notes omitted*][187]

A position contrary to Hay's is implied by the very title of an article by Mr. William Diller: "The Unborn Child: Consistency in the Law?"[188] Diller does not discuss the theoretical issue; he simply assumes that the law ought to be consistent. He points out that common law was not consistent, in that it regarded the unborn as persons from conception for purposes of property law, from quickening in the criminal law regarding abortion, and from birth (until *Bonbrest*) in tort law. Diller reviews the tendency toward consistency in recent years and refers to dicta in many decisions that show a concern of the courts to be consistent in this matter.

It is, in general, a sign of simplemindedness to expect that the same word will have the same meaning in all its uses, regardless of context. Only a dolt would take a dull saw to a dentist for sharpening because dentists fix teeth; only an imbecile would try to cash a check coat at a bank because banks pay out money for checks.

The law, therefore, is no different from life in general in using words with many meanings. The law tries to be more explicit about equivocation, for the benefit of simpletons and for the frustration of those seeking loopholes. Thus a statute establishing fire safety regulations for schools may state (or be held by the courts to mean) that it applies to summer camps and day-care centers, while these same institutions may not be required to meet the standards required of all schools so far as the training of teachers is concerned. There is nothing inconsistent in such equivocation in the use of the word "school." Fire safety regulations can serve much the same purpose in day-care centers and summer camps as in institutions whose object is the children's education, while teacher-training standards are not relevant where teaching is not undertaken.

Often legal distinctions seem arbitrary, but usually they are not, as appears on closer inspection. The tax laws may hold that a professional architect or engineer who gives a great deal of time in invaluable free service to a church or charitable organization has not donated "anything of value." But if he donates a physical object, such as a blueprint, that may be held to be a donation deductible "at fair market value," even though there is no *market* for the item, because of its very specialized character. Such distinctions seem arbitrary until one reflects how easy it would be for anyone to make—and even obtain written verification of—vastly inflated claims of the amount and value of service given to churches and charitable organizations.

Therefore, we must agree with Mr. Hay that, in general, it is erroneous to assume that a word must have the same scope in different legal rules or in diverse fields of law.

Having conceded this point, we ought next to consider what courts have said about inconsistency in regarding the unborn as persons for some purposes and not for others. Of course, many court decisions can be cited in defense of making the distinction, including many dicta in tort cases between *Dietrich* and *Bonbrest.* I wish mainly to point out that many competent judges find equivocation on this matter anomalous and unsatisfactory. Thus we will see that despite the truth in general of Hay's observation, Diller is not simple-minded in assuming that there should be consistency on this point.

In decisions regarding common law on abortion, we saw that both the Pennsylvania justice who extended the crime to the period before quickening in *Mills v. Commonwealth* and the Kentucky justice in *Mitchell v. Commonwealth* who refused to undertake such legislative responsibility referred to the status of the pre-viable fetus in property law. In *Mills* there is a reference to Coke for the civil-law status of the "infant" from conception; in *Mitchell* there is a reference to a "child in existence" from conception for its rights of property but not until four or five months later to the extent that it is a crime to destroy it.[189]

In denying recovery in *Dietrich v. Northampton,* Holmes rejected the argument that the protection afforded the quick child by common law forbidding abortion should be extended to the field of torts. He argued against the analogy both in general and on several specific grounds: that there were authorities denying Coke's rule that the live birth and subsequent death of an aborted quick child made the act murder, that extension to tort law on proper principles would not be able to limit recovery to the *quick* child, and that the Massachusetts statute on abortion did not increase the penalty if the child dies, even after birth, though it did increase the penalty if the mother dies.[190] The New York Law Revision Commission points out that there was a fallacy in this argument:

> The argument of the court based on the last mentioned statute failed to take into consideration the fact that the first statute amply provides for punishment for the death of the child, and it would be unnecessary repetition to include the provisions of the first statute in the second. It is submitted that the court has neglected to perform the simple act of reading the two statutes together and has thereby drawn unfounded conclusions from the language of the last statute alone.[191]

Justice Boggs in his famous dissent in *Allaire,* often cited and quoted in the cases that overturned the *Dietrich* precedent, argued at length not only that a viable child is not part of its mother, but also that common law recognized the child as "in esse" from conception for purposes of property and from quickening in the criminal law of abortion. Boggs summed up his argument with a rhetorical question, asking

> . . .why should it be supposed the common law would have denied to an infant born alive the right to recover damages for the injury inflicted upon it while in the womb of the mother?[192]

Among the decisions that followed *Dietrich* was that of *Magnolia Coca Cola Bottling Co. v. Jordan*, a Texas case decided in 1935.[193] The court ruled against allowing action for prenatal injuries precisely on the ground that it is not murder under Texas law to kill an unborn child. This example of argument from one field to another logically implies that if prenatal injury suits are allowed, abortion should be murder. The Texas Supreme Court overturned the *Magnolia* precedent in 1967.[194]

Chief Justice Brogan of New Jersey, in his dissent in *Stemmer v. Kline*, again a dissent often cited after *Dietrich* was overturned, summed up the argument for consistency:

> A reading of all these authorities discloses that the courts recognized the beneficence of the common law for the protection of unborn infants against the criminal conduct of others and as to inheritance and property rights without saying that such protection and rights exist as exceptions or statutory declarations. But when they follow the principle of the Dietrich case and deny a cause of action to infants on the ground that the unborn child is not a separate and legal entity, they do nothing to reconcile the contradiction or at least the anomaly between the common law rights in favor of the infant, which they recognize, and the natural right of the infant to have compensation for pre-natal injuries negligently inflicted, which they do not recognize.[195]

When the dissenting position of Boggs in *Allaire* and Brogan in *Stemmer* was accepted as the law in *Bonbrest*, the court appealed to the analogy with civil law:

> From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as human being, but as such from the moment of conception—which it is in fact. [Footnote omitted]
>
> Why a "part" of the mother under the law of negligence and a separate entity and person in that of property and crime?

The court attached to the last quoted sentence a footnote providing a dictionary definition of "person," criticizing statutes permitting *therapeutic* abortion, citing a standard text of physiology and anatomy for the point that "the fertilized human ovum is a one-celled individual," and arguing that Siamese twins are two persons although they are physically joined even less separably than the unborn child and its mother.[196] Of course, these remarks do not have authority as precedent; they are merely dicta. But so was most of Holmes' opinion in *Dietrich*, which is still cited by proponents of legalized abortion. More important, the dicta of *Bonbrest* clearly reveal the outlook of those who overturned *Dietrich* and began the current recognition of the rights of the unborn in tort law.

Verkennes, the first case allowing recovery for the wrongful death of an unborn child, quoted extensively from Boggs' dissent in *Allaire* and from *Bonbrest*, including portions of their arguments from the standing of the unborn in the law of property and crime to what their standing should be in the law of torts.[197]

Kelly v. Gregory, the first case allowing recovery for injuries incurred in early pregnancy, noted that while in certain types of cases the judges at common law accepted that "the separate legal entity of life" began at conception, in others they made "some highly artificial distinctions." The court in *Kelly* also made the extremely important point that property rights recognized by common law in the unborn could vest *before birth*:

> It is to be noticed that no distinction between viability or non-viability was attempted to be drawn in determining the point of vestiture of a legal right. Conception and vestiture became coincidental in the full sense of that word.[198]

Obviously, a right which vests in the child at any time after conception implies that infants in the womb are capable of actually having rights—of being *subjects* of rights—at any time after conception.

Finally, in *Porter v. Lassiter*, the only case thus far in which a wrongful death action succeeded involving a child that was neither viable nor live-born, the Georgia court ruled on the basis of the provision of the Georgia abortion law (at that time) by which an abortional act that caused the death of either mother or child was treated as assault with intent to murder.[199]

Many more cases could be cited to show that there is a strong inclination among judges to seek consistency in what the law will regard as a person. But the cases cited ought to be sufficient to indicate the judicial sense that inconsistency *in this matter* is an anomaly which leads to injustices. Moreover, the general (though not invariant) direct relationship between denial of a need for consistency and refusal of standing in tort law, on the one hand, and, on the other, a demand for consistency and the vindication of the rights of the unborn in tort law points to the conclusion that the trend since *Bonbrest*, which has revolutionized the position of the unborn in tort law, also has been a trend toward the establishment of the soundness of the judicial view that inconsistency *in this matter* is intolerable.

Now, the question is: why is it generally an error to assume that the same word should maintain a single scope in diverse fields of law, but an intolerable anomaly when the law is found to regard the unborn as "in esse," as "legal entities" with life, as subjects of rights—in short, as *persons*—in one field of law, but not in another?

The answer to this question is essentially very simple. A person is not related to the law merely as one of the things with which the law deals. In other words, a person is not merely part of the subject matter of the law. No, a person is a member of the community from which law originates; a person is an agent of the community in exercising legal authority, and a person is a constituent of the community for which law is ordained. We, the *people*, are the first source of the law; government should be of the *people*, by the *people* and for the *people; people* have rights and duties. "People" does not designate some abstract entity or some Leviathan; "people" simply designates persons.

The world of law is like a stage. It is a world of our own contriving. We build it for ourselves and we enact the drama of life within it. Since it is our own world, we are entitled to give the things within it natures according to our own fancy. But the freedom of the theater to indulge in fiction does not mean it can get along with imaginary producers, imaginary stage crews, or an imaginary audience. Particularly not the last, because the play is for the audience, not the audience for the play.

The law with all its fictions and devices exists to serve persons, to protect them, to guide them in fulfilling their duties, to assist them in vindicating their rights. People are not for the law; the law is for people. Thus the person in a sense stands outside the legal system and above it. Hence the law cannot dispose of persons by its own fiat, any more than action upon a stage can make non-entities of the producer, the stage crew, and the audience.

In short, the law needs to be consistent in what it regards as a person while it need not be consistent in other classifications, because persons are *subjects* of rights and duties while everything else can only be an *object* of a right or a duty. Persons are not objects. The trouble with slavery is that it does not respect this distinction. Slavery regards the slave as an object of someone else's (the owner's) rights instead of regarding him as a subject of his own rights, particularly as a subject of his own right to freedom.

There are two reasons why this difference, so vital to law, between persons and other entities may be overlooked. First, there are legal persons, which at first glance look rather like other legal fictions. Second, statutes can use the word "person" in a special sense for a particular purpose, with no less propriety than when the law restricts the scope of other expressions. We must look more closely at these two points.

As to the first, the law recognizes as "persons" entities such as corporations to which one would not attribute personality in any psychological, metaphysical, or theological sense. Even if one were to agree that personality is an achievement, not an endowment, it would be odd to talk of a corporation achieving its personality. All seem to be agreed that corporations are soulless, whether or not natural persons are thought to have souls. And if personality is thought to depend upon the reflexivity of consciousness, it is hard to see how it is meaningful to speak of self-consciousness in connection with a corporation.

But if corporations are clearly not persons in all sorts of extra-legal senses, their legal status as persons is not a mere pragmatic device on a par with other legal fictions. A corporation, after all, among other things is a unified body of natural persons joined in action for some common purpose. According to its constitution, each corporation has its authorized spokesmen and agents. These individuals, in their official capacity, act as only natural persons can act—only a human being is capable of being an official of a corporation. If we consider such an official, it is obvious that his personality does not exclude, but rather includes, his status as an official of the corporation.

In his official role, however, the agent of a corporation functions not on behalf of all the other aspects of himself, but rather on behalf of a certain limited aspect of the persons who are other members of the corporation. The limited aspect of all the persons who are members of the corporation is their involvement in the common purpose and action which they share. The corporation is not a mere abstraction and it is not a construction of impersonal entities. It is a unity made up of the stuff of which persons are made.

What does the law supply? Not the fact that the reality of the corporation is of the order of *person* rather than of the order of *object*. Rather, that limited aspects of many persons may be allowed to count as *one*. In other words, what the law supplies to the corporate person is not its personality but its corporeity.

Once this point is understood, it will be clear that the existence of merely legal persons does not count against the preceding explanation of the reason why the law is not free to dispose of persons as it is to categorize objects. Corporations are simply another way of recognizing persons with their interests, their purposes, their rights, their duties—in short, with their status above the world of law which they themselves create.

But there remains the fact that the law may use the word "person" in statutes with a restricted sense with no impropriety whatever. For example, the law of contracts may speak of "persons," while excluding anyone under twenty-one years of age or anyone not of sound mind. Thus the scope of the word "person" is limited, and attempted acts by those beyond this limited scope will be regarded as invalid.

To understand what is involved in such a case, we must distinguish between the fundamental rights and duties common to all persons and the special rights and duties which are peculiar to individuals who have certain definite roles in relation to others. The former rights, common to all, are the ones that used to be called natural and unalienable; the duties correspondent to these rights will be of the same sort. The latter rights, special to those in particular relationships, are at least partly a matter of human invention; the duties corresponding to them will be like them.

We think of persons as the subjects of rights. Thus when the law refers to the one who will have rights and duties, it naturally uses the word "person." If the rights and duties in question are special ones, arising from a particular relationship, only those capable of assuming that relationship and carrying out their role in it will be included within the scope of the word "person" in that context. So far as the relationship is the creature of law, the scope of the word "person" in such special contexts will be determined by the law. But if we consider the fundamental rights that are common to all persons, the rights that are unalienable, the law may not rightly determine that for any reason or purpose the scope of the word "person" may be restricted.

The point may be illustrated by the analogy of the theater. Within the world created upon the stage, the only individuals who count as "persons" are the characters in the play—the *dramatis personae*. The fact that the producer, the stage hands, and the audience are not listed as *"dramatis personae"* does not mean that the playwright has the power to detract from their reality. The actors themselves, as actors—rather than as the characters they play—are not part of the world created upon the stage; they are among its creators. Even so, the law can create special groups of persons, but it cannot detract from the personhood of those who create it, whom it serves.

For this reason, when we are considering the provisions of the Fourteenth Amendment of the U.S. Constitution, according to which no State may

> . . . deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws

—we are in a context where the word "person" cannot be limited for any special purpose. Here we deal with persons as those whom the law serves. We at once see why judges sensed an intolerable inconsistency in the position created by following Holmes' precedent in *Dietrich* in the field of tort law while adhering to the common law fiction-that-had-become-fact in the field of property law, and while applying a criminal law that (until the 1960s) never detracted from the common law's regard for the right to life of the quick child and often extended that same protection back to the beginning of pregnancy.

This conclusion, that law should be consistent in what it accepts as a person, may be made more vivid if we consider two imaginary situations.

There are now states in which a woman may be legally aborted if her child is likely to be seriously defective. Some abortions will be performed under this provision in cases in which an Rh-factor incompatibility is likely to create difficulties. But we have also seen that a court has considered itself compelled to take custody of an unborn child and to order blood transfusions over the parents' religious objections in order to protect the child from the consequences of this very incompatibility.

Now, we can easily imagine a judge faced with two cases, precisely alike in their medical facts, in which Rh-factor incompatibility is involved. In one, the mother decides to have an abortion. But her husband objects and seeks a court order to prevent it, on the ground that the unborn child has a right to live. The court rules according to the statute legalizing the operation (which, we assume, does not require the father's consent). Yet in the next case a woman's husband, who does not share her religious objection to blood transfusions, asks that the court order medical care in the interest of the infant despite the woman's refusal to agree to it. The court now takes the position that the unborn child is a person with an independent right to life. In effect, the court would have to regard an unborn child as a non-person if its mother wished to get rid of it, but as a person if she did not wish to take adequate care of it.

Let us imagine another situation in which a woman has become pregnant out of wedlock. She files suit on behalf of the child, and the court orders the father to support it. Feeling depressed, she goes to a psychiatrist, who suggests an abortion. The abortion is performed by hysterotomy late in pregnancy

Although the surgeon cuts the infant's foot off by a slip of the knife, the baby is born alive, breathes, and cries. A nurse disobeys orders to dispose of the infant, and instead cares for him and he survives. The mother sees the baby and decides to keep him. She now files suit on the child's behalf for the negligent surgery by the result of which he will have to go through life without one foot. The legislature, with unusual foresight, has provided that no action may be brought under the wrongful death statute for the death of an infant resulting from legal abortion. But what is to be done about the child's right to recover for prenatal injuries? It was a person with a right to paternal support and a non-person with no right to life; shall it be deemed to have been a person or not when it was maimed?

Such anomalies would be intolerable. Clearly, the law must be consistent. Either the unborn are persons or they are not. Personality cannot be conferred on them and withdrawn from them by legal fiat.

The Unborn Person and Equal Protection of the Law

If the law ought to be consistent about what it regards as a person, there remains the question how the law ought to regard the unborn. There are three possibilities. The unborn might be consistently regarded as non-persons; they might be consistently regarded as persons from the biological beginning—that is, from conception; or they might be consistently regarded as non-persons up to a certain stage in pregnancy and consistently regarded as persons thereafter.

If the unborn were consistently regarded as non-persons, they might most plausibly be treated as part of their mothers' bodies. As such, the criminal law should not forbid or regulate abortion except in the interest of pregnant women. Thus abortion without the woman's consent would be forbidden, not by any special statute, but by the general prohibition of assault. The induction of abortion by non-physicians would be forbidden by statutes banning unlicensed medical practice. In tort law, wrongful death actions would not be permitted in the case of the unborn. The mother could be permitted to sue for damage to the unborn child as injury to herself, but would not be permitted to recover much, since the infant in the womb, after all, is a "part" of the mother easily replaced—in fact, the only large part that regenerates. The child that is born suffering the consequences of someone's tortious act might be permitted to recover on the principle that he—the liveborn child—had been damaged by the act through a sufficiently established and foreseeable causal chain of events. In property law, rights would never be regarded as vesting in the unborn. For purposes of inheritance, there would have to be maintained a strictly consistent policy that the unborn were fictions, regarded only "as if" they were offspring after their survival following birth. In equity, guardians would not be appointed for the unborn. A woman would not be ordered to care for her unborn child by undergoing transfusions; a man would not be required to support the unborn child, but could be required to care for the pregnant woman.

This recitation shows two things. First, there is no logical impossibility in consistently regarding the unborn as non-persons. Second, to do so would conflict to a considerable extent with the traditional attitude of Anglo-American common law—which, however, was not itself consistent—and would conflict to an even greater extent with the predominant (but not invariant) recent trends in the development of the law, especially in tort law since *Bonbrest.*

That revolutionary development came about not because of any metaphysical or theological dogma, but because of a sense that it is an injustice not to admit the rights of the unborn, an injustice more and more glaring in the light of the better and better appreciated fact that biologically the infant in the womb is not a part of its mother. We have set forth the biological facts sufficiently in chapter one and reviewed them in chapter six. We have reviewed the trends of legal development in earlier sections of this chapter. It remains here to notice the constitutional implications of certain significant cases.

In *Tucker v. Carmichael,*[200] the court argued:

> It would therefore be illogical, unrealistic, and unjust —both to the child and to society—for the law to withhold its processes necessary for the protection of the person of an unborn child, while, at the same time, making such processes available for the purpose of protecting its property.

The case was in tort law; the reference to protecting the "person" to personal injuries, in contrast with property damage. Glanced at superficially therefore, the argument seems to be just another instance of the inference from property law to tort law that has been made so often since *Bonbrest.* However, the Georgia court was saying something more, when it referred to the anomaly in terms of *the law* withholding its *processes* in one field and making such *processes* available in another. This language is a clear allusion to the constitutional guarantee to every person of due process and equal protection of the laws.

Two state supreme courts have held that unborn children are persons within the meaning of provisions of their state constitutions guaranteeing a legal remedy for torts. Both cases involved prenatal injuries. In *Williams v. Marion Rapid Transit* the infant was viable and the injuries resulted from the defendant's negligent operation of a bus. The Ohio Constituion in a specification of the due process guarantee to tort law, requires that

> . . .all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation shall have a remedy by due course of law, and shall have justice administered without denial or delay.[201]

The court applied this provision to the unborn plaintiff:

> To hold that the plaintiff in the instant case did not suffer an injury in her person would require this court to announce that as a matter of law the infant is a part

> of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right conferred by the Constitution upon all persons, by the application of a time-worn fiction not founded on fact and within common knowledge untrue and unjustified.[202]

The second occurrence of the word "person" in the passage cited from the Ohio Constitution corresponds to the first occurrence of it in the court's statement. "Person" in that use merely means *body*. But the Constitution, in providing that "every person . . .shall have a remedy," and the court, in refusing to deny the infant a "right conferred . . .on all persons," use the word "person" in the same sense in which it is used in the Fourteenth Amendment of the U.S. Constitution.

The Oregon case is similar, except that the unborn child was only about six months along at the time the injuries were inflicted. In other words, viability was doubtful. The Oregon Supreme Court nevertheless upheld the right of the unborn plaintiff to recover damages, using a provision of the Oregon Constitution similar to the passage cited from the Ohio Constitution. The court also invoked the consistency argument, observing that the state had recognized "the separate entity of the unborn child by protecting him in his property rights and against criminal conduct . . ."[203]

In 1963, the U.S. Supreme Court stated in *Sherbert v. Verner* that interference with the religious liberty guaranteed by the First Amendment can be justified only by "the gravest abuses, endangering paramount interests."[204] The case of *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson* was decided by the New Jersey Supreme Court shortly afterwards.[205] This was the case in which a woman was compelled to undergo blood transfusions despite her objections on religious grounds. The New Jersey Supreme Court required the woman to submit, not for her benefit, but for the welfare of her unborn child. Mrs. Anderson attempted an appeal in federal court; *certiorari* was *denied*. Implicit in this case is the proposition that the welfare of the unborn child is not merely a value that the law may or may not take into account, but is rather a *paramount interest* which prevails even over fundamental liberties guaranteed by the First Amendment.

These cases help to point up the fact that if the law is now consistently to regard the unborn as non-persons, it will not only disregard the *implications* of recent trends, it will actually have to overturn *precedents* which have acknowledged the rights of the unborn on constitutional grounds. Proponents of the legalization of abortion on demand often think, or pretend to think, that there is no existing legal barrier in the U.S. Constitution's guarantee of due process and equal protection. But the Constitution does not limit its guarantee to persons already born, and the rights of the unborn already have been recognized by state courts and even treated as paramount in comparison with the liberties guaranteed by the First Amendment.

The difficulty of holding consistently that the unborn are non-persons becomes particularly acute when we consider in the concrete what arbitrary distinctions this position would imply. Some very definite criterion of birth is required—e.g., the cutting of the umbilical cord. Such a criterion of course has been used in the past, to distinguish abortion from murder. We saw how in the *Chevez* case this sort of criterion was held to be unrealistic, and a homicide statute was held to apply to a live child in the state of being born.[206] But if the unborn are to be held consistently to be non-persons, we should have to hold, for example, that a woman in childbirth might arrange with her obstetrician to examine the baby before the cord was cut (if that were the criterion selected for birth) and to kill it if it did not fulfill her requirements as to sex, eye color, lack of defects, and so forth. The law could take no notice of such killings, unless someone made a mistake and cut the cord *before* killing the baby. Then all involved would be accomplices in a first degree murder.

To evade such *obvious* arbitrariness, many suggest that some stage of pregnancy prior to birth should be used as the point of demarcation. Prior to that point the law might consistently regard the unborn as non-persons, as previously outlined, while after that point unborn children would be regarded consistently as persons. We shall consider shortly what would be involved in a consistent legal policy of regarding the unborn as persons. First, we must consider the merit of drawing a line at some point between conception and birth.

There are only two possibilities suggested by our legal tradition: quickening and viability. Quickening always was quite variable and subjective, depending on the relative size of the infant and the mother, the sensitivity and experience of the mother, and other such factors. However, the event was *thought* to be significant of the child "coming to life." Since this idea is obviously without scientific foundation, no one seriously proposes quickening as a dividing line any more.

Viability, as we saw in the last section of chapter one, also is variable and relative to the care the child is given and to such puzzling factors as the child's race. Therefore, in the case of each particular prospect for abortion, one could not be certain in advance that it would not be one that could not survive if carefully delivered and cared for, even within existing techniques, unless it were surely very early in development.

Moreover, the arbitrariness involved in using birth as the dividing line is not eliminated, but only concealed, by using some dividing line—for example, twelve weeks of uterine development—prior to which we are quite certain no baby would survive even with the best application of available methods of care. What will be done when the artificial placenta becomes available? Will the legal status of the unborn as persons benefit by the advance in technique? Or will we decide that such an important distinction must not be allowed to rest on the state of technology?

It is also important to notice that the admission of viability as a legally significant dividing line does not have a very strong basis in our legal tradition. It has played a role in the development of tort law since *Bonbrest* because

Holmes in *Dietrich* said that the unborn child is part of its mother. Boggs in *Allaire* pointed up the absurdity of this by the fact that the baby in that case was in fact viable—it was almost being born. Others emphasized viability in overturning *Dietrich*, and the *argument* from viability then was used by some courts as a *criterion*. But this criterion has not held firm since *Kelly v. Gregory*, except in cases involving wrongful death actions where the infant is not born alive.

Some who favor viability (or some line such as the end of the twelfth week of uterine development), as the criterion for distinguishing between embryonic non-persons and uterine persons, admit that such a criterion is arbitrary, but assert that the arbitrariness of the criterion should not be an objection to it, since the law constantly uses such dividing lines. The day before his twenty-first birthday, John Doe (who may be more capable of managing his affairs than ninety percent of the adult population) is legally an "infant." He cannot make a valid contract; he cannot vote; he can sue only if a guardian or "next friend" files the suit on his behalf. Joe Roe, who is one day past his twenty-first birthday, can do all these things, although he is nearly moronic.

The dividing line is arbitrary, but we must consider the purpose behind it. Children must be protected from exploitation; they cannot carry out the responsibilities of adults. But to avoid uncertainty about status, an arbitrary dividing line must be maintained. Yet this is mainly to *protect* the rights of children; it is not to benefit others. Of course, at times his legal status inhibits a minor from having certain benefits. But the interests at stake are not of the order of fundamental, common, unalienable rights. An arbitrary dividing line, to be acceptable, must not be a line that divides non-persons from persons.

But what about the right to vote? Important as the civil right to vote is, it is not as important as the human right not to be killed. Since action by the individual himself is necessary to exercise the right to vote and since small children are simply incapable of that action, some dividing line is unavoidable, and an arbitrary one that is clear is less open to abuse than one better grounded in objective principles. The right to life, by contrast, requires that others forebear rather than that the person whose right is protected actually exercise it. Therefore, every person is competent to have his right to life protected.

This argument is important because it helps to reveal more clearly how objectionable it would be, in the face of recent legal development, to begin now consistently to regard those unborn or those not yet arrived at a certain stage of fetal development as non-persons. The only reason that could motivate such a legal policy would be to permit the "non-persons" to be killed without legally attending to a violation of their right to life. In law there must be a certain amount of arbitrariness. But there is tolerable arbitrariness and there is intolerable arbitrariness. Arbitrariness exercised for the precise purpose of denying a fundamental right is intolerable.

There remains, then, only the possibility that the law might consistently regard the unborn as persons from conception. To this possibility there are a number of objections, which we shall have to consider in due course. It should be clear at the outset, however, that if the law were *consistently* to regard the unborn as persons from conception on, this policy would be a new one. It would be *in line with* the trend evident in the law of torts since *Bonbrest* and to a less extent present in other areas of law, with the sole exception of the movement to relax or repeal abortion laws. But the law has never *consistently* regarded the unborn as persons from conception. We shall have to consider what such a policy would mean.

The implications in the area of property law would not be drastic. The only difference would be that if a child acquired property rights before birth and died before birth it would leave an estate. In tort law, so far as personal injury cases are concerned, no significant changes would be necessary, thanks to the revolution initiated by *Bonbrest.* Wrongful death statutes should be held to apply, yet there are good reasons for severely limiting the scope of these statutes, and all on whom no one is economically dependent might well be excluded. Equity already has taken a sound approach.

What about the criminal law regarding abortion? Must all abortion be regarded as murder? Since abortion is usually performed with premeditation, with direct intent, and without provocation, must it be first degree murder? Must those who have abortions and those who perform them be hung, sent to the gas chamber, or to the electric chair?

As to the last question, I argued in chapter six that capital punishment is not morally justifiable in any case.[207] Moreover, parents who kill children already born are seldom treated with the full severity of the law of homicide. There are distinctions made that take into account the fact that in dealing with the murder of an adult we are dealing with a crime that has many aspects of wrong and injury, only one of which is the attack on another individual's life.

No social order whatever is possible if healthy adults begin killing one another; history amply testifies to the possibility of a sort of social order in which abortion, infanticide, and euthanasia of the aged and weak are practiced. It seems to me that without detracting from anyone's right to life, we could distinguish between crimes the whole malice of which arises from their trespass upon this right and even worse crimes—ones that join the malice of destroying life to the malice of undermining the very possibility of social order.

In effect, the common law made this distinction, for it treated the abortion of a quick child as a crime nearly capital, yet did not treat it as murder, since to be the victim of murder one not only had to be a reasonable creature *in being* (which the quick child was) but also *under the king's peace.* Murder not only attacked human life, it attacked the king's peace—the principle of social order.

If abortion were treated as simple homicide (whereas "murder" were reserved for the more socially destructive forms of attacking individuals' lives), the crime still would in fact not be able to be proven in most cases of abortion performed in early pregnancy. The law could forbid the crime, but the elements of the crime surely would be given only if there were a living individual and if it died as a consequence of the abortional act. Since the state must prove each element of a crime beyond a reasonable doubt, homicide of the unborn would be fairly difficult to prove. This situation dictates that there should be statutes forbidding abortion attempts, whether or not there is a living individual to be killed.

The practical result, then, would be quite close to the situation which developed in the statute laws regarding abortion. The important distinction needed in criminal law is between murder and simple homicide. There remain other problems, such as the issue of therapeutic or other excuses, and we shall deal with these questions presently. At this point, enough has been said to provide a tolerably adequate idea of what it would mean for the law consistently to acknowledge the unborn as persons from conception.

The next step is to prove that the law ought consistently to follow this principle. There is only one reason: the basic principles of social justice cannot otherwise be maintained in a pluralistic society. By a "pluralistic society" I mean one in which no particular metaphysical or theological thesis can be established as the official principle of public policy. The basic principles of social justice that I have in mind are the content of the concepts of due process and equal protection set down in the Fourteenth Amendment to the U.S. Constitution. Next I must explain the argument.

I showed in chapter one that from the viewpoint of biology a human individual begins at conception. Life does not begin at conception; life is continuously transmitted. A sperm or an ovum is alive, but it is not a living, human individual; it is an individual, human gamete. In the present chapter we have seen a good deal of evidence that the biological facts played a central role in the history of the law of torts involving the unborn, and some evidence that the biological facts played a part in the tendency of other areas of law to expand recognition of the unborn.

But I also argued at length in chapter six that the question of what the person is, is not a factual question that can be settled by biology.[208] The definition of "person" is essentially a matter of metaphysics or theology. Whether one says that a person is nothing more than a living, human individual (which is my own view), or that a person is an individual that is "animated" by a rational soul (which is what the medievals believed), or that a person is a human being with consciousness (which is what Joseph Fletcher says), or that a person is one who has reached certain standards of achievement (which is Ashley Montagu's position)—every view of the person is equally metaphysical or theological, equally non-demonstrable in terms of analytic reason and empirical evidence.

In rejecting the view that the unborn are persons with a right to life, Mr. Glanville Williams briefly summarizes the biological process of conception, and points out the continuity in that process. He then attempts to argue on the basis of the biological facts that personality begins and ends where we choose to set the boundaries:

> The truth surely is that human beings are part of the continuum of nature. A man's commencement is no more a perfectly fixed and definite point of time than his death. Philosophically speaking, our conception of human personality, like our conception of every other kind of unity, is something that we impress upon nature rather than something that is found in nature. All unity is subjective; it exists only to the extent that we choose to perceive it. There is, indeed, an underlying reality, but our conceptual unities have sharp edges nonexistent in nature. These sharp edges are the products of our imagining and are always in a sense arbitrary.[209]

Williams is in error if he believes that his theory is implied by the facts of biology. Of course, fertilization (conception) is a process, not an instantaneous event. The process is over, however, at least when the first cell division of the new individual begins, and that division is the empirical proof that there is (in the biological sense) a new *individual*, distinct from the parent gametes.

Williams is asserting, in part, what I am saying myself—namely, that the question of what a person is, is a philosophical question, not a question of fact. But Williams is going beyond this general position to assert a particular metaphysics, a metaphysics that will easily be recognized by all students of philosophy as an idealistic process theory dominated by operational (pragmatic) principles. I do not wish to argue here whether this metaphysics is tenable. The point is that when Williams holds that there are no distinctions in nature and that all unity is subjective he is announcing a view that is hardly obvious. The ordinary man supposes that the distinction between himself and Glanville Williams is as objective as can be, but according to Williams the ordinary man is mistaken. Williams may be right, but empirical evidence cannot prove that he is.

Thus, Williams also holds a certain metaphysical view of what a person is. His view is that the person begins and ends wherever we choose; other metaphysical positions would say a person begins at conception, or sometime thereafter. I am not interested in settling which of these views is correct. I only wish to point out that if public policy is not to be based on some particular metaphysical assumption, then it may not be based on Glanville Williams' metaphysics, Joseph Fletcher's metaphysics, or Ashley Montagu's metaphysics any more than on my metaphysics or on the metaphysics of the medieval school.

Those who favor the relaxation or repeal of abortion laws often point out that the law cannot rightly work on the assumption that there is a soul or some other metaphysical or theological entity in the unborn child in virtue of which it is a person. This argument is certainly correct to the extent that it refers to the public policy of a pluralistic society—a nation such as the United States. No ultimate worldview may be officially established without undermining the very foundations of the pluralistic society. But it must be recognized that by the same token the secular humanist worldview with its utilitarian ethics cannot rightly be taken for granted in the public policy of our pluralistic society.

Yet law must have a concept of person, for it must know whom to regard as the subjects of the rights it guarantees. How can law arrive at a judgment as to what will count as a person without committing itself to a particular worldview?

Common sense is not an adequate criterion. By that standard, the corporation would not qualify as a person, but it is a person with full constitutional rights so far as the guarantees of the Constitution can in the nature of the case apply to the corporation. An individual during the first few weeks after conception does not "look like a human being," and we have difficulty imagining ourselves at that stage of development. But surely such subjective impressions of common sense cannot be decisive for the law.

Similarly, the problem should not be left to the decision of majority opinion. If majority opinion is to be decisive, then the rights of the minority—of every minority—are in principle undermined, for what is at issue is the criterion according to which one will be able to remain a *person*—a subject of rights—though in the minority.

At the same time, it will not do to allow just *anything* that *anyone* believes is a person to count as a person. Some people are so attached to their pet animals that they would claim them to be legal persons. Others would say that their right and left hands were distinct persons, each entitled to a vote in elections. Yet I think there are very few sane people who would wish to maintain seriously that anything neither a living, human individual nor a unity composed of aspects of such individuals (such as a corporation) ought to be counted by law as a person.

To reduce the circle of those who are to count as persons so as to exclude some living, human individuals might be approved by a majority and might be sanctioned by common sense. After all, who would imagine a sixteen-cell individual a few days after conception to be a *person* in any common sense meaning of the word?

Still, if an effort is made to determine what is to be included under the most basic meaning of the word "person," as it is used in ordinary English, I submit that it is difficult to exclude the unborn. Webster's *Third New International Unabridged Dictionary* arranges definitions in the order of the time at which the word began to be used with each meaning. If we look under "person" we find: "1a: an individual human being." The biological facts amply show that the unborn fulfill this requirement. Of course, Webster's offers other definitions. A much more recent use is: "8a: a being characterized by conscious apprehension, rationality and a moral sense." This is one meaning of the word, but it is more restrictive than the earlier and more general meaning.

Since this is the case, I submit that the correct public policy for a pluralistic society is to accept the more comprehensive view rather than an exclusive one. Regardless of the ultimate validity of a worldview that regards the sixteen-cell individual as a person, if the pluralistic society is really going to be pluralistic, then that individual ought to be treated as a legal person.

Why? Doesn't this conclusion mean that a minority will rule, that a woman who wants an abortion will be legally required to go through with her pregnancy and have a baby despite her own conviction that the aborted embryo is not a person? The woman will indeed be restricted by the law from doing as she wishes, and a majority might approve her wish. Yet it is not the minority, but the constitutional principles we all approve that demand this result. There is no injustice in this, because the law—not able to adopt any metaphysical concept of person as the official one—must take the standpoint of the one to be aborted and from that point of view assume that it, if it were given the ability and opportunity, would accept an opinion that would make it be a person, a position that would endow it with rights rather than a position that would deny rights to it.

The issue, if our society is to remain pluralistic, is not what one or another faction, whose own right to life is not at stake, thinks about the legal status of the unborn. The real issue is what the law should suppose the unborn would claim for themselves, if they were able to make the claim. No one cay say, of course, what they *would* claim; that question is meaningless. But the law should *suppose* that the unborn themselves would claim a right to live, that they would accept the view according to which they would be legal persons. To take a different assumption is in fact to impose upon the unborn a theory of personality we, in a free society, have no right to assume they would share.

The solution to the problem of how public policy can have a notion of person adequate for legal purposes, without committing the whole society to any single ultimate notion of what a person is, thus is simple. The law must not simply look upon the unborn as objects; it must see whether there is not some coherent perspective from which they may be supposed to be subjects.

If so, then the law must avoid imposing any one else's metaphysics on the unborn, and must assume for them—tentatively as it were—an interim position according to which in legal matters they claim the status of persons and all the rights that go with that status. If, later on, the individual does not wish to maintain that position, he can take a different one. If a perspective of a sort that would have excluded the unborn individual's personhood had been adopted, he could not subsequently have corrected the assumption as to his view.

The issue is not squarely faced as long as it is supposed that the conflict concerning the rights of the unborn is between people who want abortions and other already-born people who believe abortion to be wrong. That is the conflict in the field of politics, of public opinion, of clashes between proponents of different ultimate visions of man and the universe.

But the conflict before the law is whether to accept the view of one who wishes to kill it that the unborn human individual is not a person, or whether to accept the view, which may plausibly be attributed to the potential victim, that it is a claimant of the right to life, and that it seeks the equal protection of the laws. It does not demand that the law be intolerant of views according to which it is a non-person; it asks only that the law regard it on that basis which gives it a legal status and guarantees its right to life.

Glanville Williams says: "When considering the moral rule that human beings must not be killed, it becomes necessary to define 'human beings' for the purpose of the rule."[210] Of course. But here we deal not with a moral rule—law is not morality. We deal with the legal standard of due process and equal protection of the laws. And the question is whether it is consistent with the standards of a pluralistic society to impose on a certain group of human individuals a definition of "person" favored by those who would approve killing individuals of that sort, when the definition imposed will make these individuals non-persons and when there is in the society another definition that would make it possible to grant those individuals the protection of *legal* personality—regardless of what their metaphysical status might be thought to be.

In this situation, no liberal should stand in favor of the narrower definition of "person." Rights should be extended, not restricted. That is why throughout this book I do not speak of the "liberalization" of abortion laws when I mean their relaxation, their broadening, their loosening. There is nothing liberal about labeling the unborn non-persons to facilitate their consignment to oblivion.

In the preface to *The Sanctity of Life and the Criminal Law*, Glanville Williams wrote:

> The main theme of the book may be simply stated. Much of the law of murder rests upon pragmatic considerations of the most obvious kind. Law has been called the cement of society, and certainly society would fall to pieces if men could murder with impunity. Yet there are forms of murder, or near-murder, the prohibition of which is rather the expression of a philosophical attitude than the outcome of social necessity. These are infanticide, abortion, and suicide. Each extends the disapprobation of murder to particular situations which raise special legal, moral, religious, and social problems. The prohibition of killing imposed by these three crimes does not rest upon considerations of public security. If it can be justified at all, this must be either on ethico-religious or on racial grounds.[211]

Williams sees the pragmatic grounds that make the murder of healthy adult human beings an attack on any possible social order as well as a violation of an individual's right to life. He also sees the ethico-religious grounds which make all killing of the innocent immoral. He does not see any basis for an indispensable legal principle protecting the right of life of those who cannot protect themselves—of those not useful to society. Yet the U.S. Constitution guarantees due process and equal protection of the laws to all *persons*. This guarantee seems neither merely pragmatic nor (necessarily) ethico-religious. I think that Williams has failed to notice something that is indispensable to law in a pluralistic society.

Perhaps it will help to bring what I believe Williams has ignored into sharp focus if I point out one respect in which I do not think it necessary that the law coincide with the "ethico-religious" standard Williams wishes to set aside. Traditionally, suicide has been regarded as a moral violation of the sanctity of life; more recently, the special form of suicide called "voluntary euthanasia" has been condemned on the same basis. Within my own ethics, I would hold suicide wrong. However, it does not seem to me that the law *must* forbid suicide, suicide pacts, and voluntary euthanasia.

This is not to say that there may not be good grounds for forbidding or regulating such practices. Obviously, if any form of euthanasia is legally approved, many other forms may be difficult or impossible to control. That may be a good enough reason for maintaining the legal prohibition. All I am saying is that I do not see any fundamental incompatibility between our basic law, with its concepts of due process and equal protection, and a legal policy permissive with regard to self-destruction. For immoral though such an act may be, it violates no one's fundamental rights, since a person does not have rights against himself, and the deadly deeds in question are, by hypothesis, in accord with the individual's own will.

But infanticide and abortion present a quite different problem. The law need not prevent such forms of simple homicide on pragmatic grounds; some sort of society could survive if they were freely permitted. But what sort of arrangement would the legal system of such a society be? It would protect those strong enough to make a nuisance of themselves if they were not protected. It would abandon those from whom no one had anything to fear. Those whose lives the law protected would not be granted protection because of an antecedent right to life. Rather, they would be protected because of the danger involved in excluding them. The right to life would be conferred by the strong upon themselves, and they would have this right as long as they remained strong. Law would simply be the set of rules by which the strong avoided costly conflicts with one another, the better to exploit the weak.

Societies have existed that fulfilled these specifications. But that is not the sort of society projected by the Constitution of the United States, and especially by the Fourteenth Amendment. In our fundamental law we see the outcome of an effort by reasonable and honest men to find better grounds for expecting of law what they wanted of it.

They wanted personal security as everyone who is able to want anything does. But why expect the law to provide it? Not—since they wished to be reasonable—merely because they were strong enough to make life difficult for others if personal security were not mutually guaranteed. Rather because the law expressed the necessary conditions for sharing together in the pursuit and enjoyment of certain values, values on the importance of which everyone is agreed. These values—domestic peace, justice, liberty, defense against common enemies—can be shared only if the lives, liberty, and property of all, the weak as well as the strong, are guaranteed. In fact, the whole point of law is to make the naturally unequal sufficiently equal that they can cooperate as persons in a common life, not become exploiter and victim, master and slave. He who is too weak to defend himself is given the armor of the law; he who is too easily seduced to keep his freedom is liberated by legal keys from the captivity into which he has been led; he who is too stupid to keep his possessions is protected from the fraud of the wily by the accounting the law demands.

Thus reasonable and honest men established a system of law guaranteeing the rights of "every person" and defining what is permitted to be done to "no person." This is what we mean by justice. It is not an ethico-religious postulate. But it is not merely an expression of the minimum pragmatic conditions without which there can be no society at all. What Glanville Williams overlooks is simply this—justice. An unjust society is possible; radically unjust societies have existed. But the law is not a device for creating a society with as little justice as possible.

As I explained in chapter six, utilitarianism is completely useless as a moral system because it can reach any conclusion at all once one knows what conclusion is to be reached. But sometimes the conclusions will have to be quite implausible. That is how it often is if one attempts a utilitarian account of fundamental rights guaranteed by the U.S. Constitution. It is sheer commitment to principle, not any obvious utility, that requires such elaborate care to protect the rights of persons accused of crimes. Surely there could be a good deal more order if there were considerably less law—law of the sort that forbids an individual being required to testify against himself.

Thus the due process and equal protection provisions are necessary not for utility but for a just society. It is no accident that the first was reiterated and the second fully articulated in the context of the Fourteenth Amendment, one of the amendments which put an end to slavery, an institution quite conformable to Williams' pragmatic conception of the law, but irreconcilable with justice.

My conclusion, therefore, is that the law should be consistent in what it recognizes as a person. It should recognize the unborn as legal persons. And given this recognition it may not restrict its protection of fundamental rights in such a way as to make an exception of the unborn, of infants, and of others too weak to protect themselves.

This conclusion is adequately supported by the arguments given, but it is confirmed by the trends of legal development we surveyed earlier in the chapter. The courts in *Zepeda, Williams,* and *Gleitman,* for example, did assume for the infant plaintiffs a point of view according to which at conception they would have claimed the status of persons and preferred life to the utter void of non-existence. Of course, the decisions were *against* a claimed right not to be born, not *in favor of* a right to be born. But in reaching their decisions, the courts viewed the unborn infant at the beginning of its existence as a subject, not as a mere object. The parents in the latter two cases certainly held a different view, but the courts refused in *Williams* and *Gleitman* to regard the interest of the infants from the parents' viewpoint.

The view that the legal notion of person should include every living, human individual receives some confirmation from a recent attempt by the U.S. Supreme Court to lay down the criteria of "person":

> We start from the premise that illegitimate children are not "nonpersons." They are humans, live and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.[212]

The criteria mentioned—human, alive and actually existing—hold of the unborn. Thus they also should be held to be legal persons.

Answers to Further Objections

It may be argued that in insisting that the law must consistently hold the unborn to be persons from conception, or non-persons up to birth (or some earlier time) and persons thereafter, I have omitted another possibility, in many ways more attractive than the alternatives considered. This possibility would be that at conception the living, human individual begins and begins to become a person, that his personhood is actual (if incomplete) at birth, and that between conception and birth the unborn individual is acquiring by a continuous process what he will fully be only at birth.

This view is somewhat like the notion that in the time before quickening there is "embryo life" but not a live child. The idea also is similar to that of the Anglican commission, which we examined in chapter six, according to which the unborn child is a potential person with some rights, but with rights inferior to those of actual persons.[213]

There are several factors that make such an idea attractive—almost "natural." It conforms to the continuity of development that we experience; we easily imagine the personality growing as the person grows, for we identify a person with the living body that he is. Also, the notion of potential personality and diminished rights is attractive as a possible basis of compromise between sharply conflicting alternatives. Most important, I think, is that a view of this sort conforms to the naive empiricism of the human mind, according to which what cannot be directly perceived by the senses may somehow be "real" but is not as real as the thing right there now—"before my very eyes," "heard with my own ears," "held in my own hands." When a woman is pregnant, she and all who share her expectation look forward to this experience, which is the final confirmation of the reality of the child. Quickening used to be so important because the child *moved*—an evidence of life—and because the mother *felt* the child move (and others might too by placing their hands upon her belly). What is felt is real, although not quite as real as what is also seen, heard, smelled, and held in one's hands. Thus works the human imagination.

There was a time when some protection would have been given—was given—to the unborn by the imagination of them as in the process of development between non-person and person. That was the time when the generative process was regarded as inviolable in view of the *possible* child that might be conceived and born. In our contraceptive age, however, there is little respect for that which might be; the entire movement to legalize abortion is nothing more than an extension of the contraceptive mentality to post-conceptive birth control, regardless of the question of the rights of the unborn, even after they have become actual, living embryonic humans. When a person begins became crucial as soon as people lost the sense of reverence for the process preceding the beginning.

Whatever the metaphysical merits of regarding personality as an entity that can grow by degrees, so that one can be more or less a person, the idea is not legally viable. The legal concept of person is an all-or-none idea. Either one is within the scope of the Fourteenth Amendment or not. If the unborn as supposedly potential persons belong outside that scope in virtue of the potentiality that qualifies their personality, then legally they are not persons at all. They might just as well be the sperm and ova into the disposition of which the law cannot meddle. If the unborn as "potential" persons belong inside the scope of the Fourteenth Amendment, then "potentiality" is no more significant a qualification than "black" or, for that matter, than "criminal," "insane," or "imbecilic." There are *no* second-class persons when it comes to fundamental rights. Thus, the law must have a simple "yes" or "no" to the question whether the unborn are persons or not. In the present situation, if the answer is "no" the unborn child might as well be viewed simply as a part of its mother's body.

Another objection that is likely to be made is that for many purposes we do not now and never have regarded the unborn as persons. Glanville Williams argues:

> A pregnant woman who travels by public transport has to take only one ticket. She travels on only one passport. No child is given a baptismal or other official name before birth, though it may be given a name at any time thereafter.[214]

In many cases an adult occupying only one seat with an infant pays only one fare. Williams no doubt overlooked this point because he does not make much distinction between abortion and infanticide. A passport is a form of identification. Unborn infants stay close to their mothers, they are hard to identify except as "the unborn infant of so-and-so," and they are not likely on their own to enter a country illegally, smuggle, or do any of the other things immigration and customs officials worry about.

As to names, the situation is more complex. Parents sometimes do name their unborn children, but generally do not, partly because they do not know whether a boy's or a girl's name will be appropriate. But Williams says "official name." Names become official when they are used in records, and records are partly like passports—they serve as identification. Another aspect of names is that they serve in conversation to mark the subjects of social relationships. The unborn child is not a member of society in the natural and immediate sense, because no one, except the mother, can be in *touch* with him, can deal with him, can react to him. That is why the unborn child is so much more real for its mother than for anyone else. In part the idea that women should be allowed to dispose of their unborn children as they please derives from the feeling that they are persons *for her* but not for society at large.

A great many arguments similar to those just criticized are offered by various authors. Spontaneous abortions and stillbirths do not have to be registered, it is said. That depends on the jurisdiction. Mortality records serve many purposes today, but keeping them for the unborn may be regarded as irrelevant, impossible, or ineffective. Unborn children need not be buried in a cemetery. But they sometimes are. Regulations depend to a considerable extent on sanitation problems. We can think of many situations in which adult persons (especially of "inferior" race) were not given burial. An aborted infant is not given a funeral. But often there is no funeral service for infants either. And sometimes, if there is, it is not the usual service used for a grown person.

All such arguments may be answered in the following manner. First, consider whether the alleged fact is true. Very often it is entirely false or only partly true. Second, consider whether any discrimination that is made between the unborn and other persons is really based upon the supposition that the unborn are not persons, or whether it is not simply because they are *unborn.* If law and custom work on the assumption that the unborn are in many significant ways different from the rest of us, that is only realism. But the relevant differences do not necessarily imply that the unborn are not persons. There is no racial discrimination involved if one takes realistic account of genuine differences between the races—for example, if a physician examining a Negro patient checks for the presence of a blood disease to which only Negroes happen to be susceptible. But there is invidious discrimination if one supposes that those who are different from us are therefore not persons legally equal to us.

Finally, if the law or custom that involves discrimination between those already born and the unborn really does imply that the latter are not assumed to be persons, one must consider whether the assumption is merely a product of the imagination, which regards the unborn child as in process from non-being to being, from non-personhood to personhood, or whether the law or custom in question is a product of a settled conviction that the unborn are legal non-persons. The only completely clear example of the latter conviction is a law or custom freely admitting abortion in a society that forbids the killing of infants and children. Since the justifiability of such a law is the issue, advocates of abortion cannot appeal to this example without assuming what they wish to prove.

A more technical line of argument may be advanced on the basis of the precise wording of the Fourteenth Amendment itself:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The occasion of this section was, of course, to establish and guarantee the civil and human rights of former slaves; subsequent sections deal with other problems consequent upon the Civil War.

According to the Fourteenth Amendment, unborn children are not citizens. But that is like not needing a passport. The point of the wording is to establish a simple condition which, when it is met, makes citizenship (and its privileges) automatic and undeniable. Conception would not serve as well, because it is often hard to prove where it took place.

Someone might suppose that the due process and equal protection clauses use the word "person" to mean citizen, so that these guarantees do not apply to the unborn. The fact that two distinct words are used and general principles of construction (rights should be extended) argue against the notion that "person" here ever was limited to citizens. In any case, such a view cannot be maintained today, for these clauses have been applied to aliens and corporations as well as to citizens.[215]

It might be thought that even if the unborn are persons, they are not persons *within the jurisdiction* of the United States, as at common law the unborn child was not *under the king's peace.* But the history of legal trends in recent times falsifies this notion. A court could hardly appoint a guardian for someone not within its jurisdiction, to mention only one example.

Someone might suppose that if a State passes a law permitting abortion, the requirement of due process is fulfilled provided the law is properly enacted by the legislature and governor. But "due process" means more than this. It means an open hearing, with suitable warning beforehand, before a properly constituted tribunal. The one whose life, liberty, or property is to be taken must have legal representation, who must be allowed to hear the opposing case, examine the evidence, cross-examine witnesses, and present the case against the projected deprivation. Finally, there must be an opportunity for appeal.[216]

Someone might deny that the due process clause of itself demands that the state attempt to regulate every incursion by private persons or agencies on the protected goods. The clause only says that the state itself may not deprive anyone of these goods. Abortion law relaxation or repeal does not make abortion an act of the state, but only an act not prohibited by the state. But if it is granted that the unborn are persons within the meaning of the clause, it is relevant to ask how far such an objection would prevail if any other class of persons were deprived of the protection of their very lives? Such an exception, if not a technical violation of the due process clause, is a violation of the equal protection clause. Even on the technical plane, it may be argued that in virtue of the Civil Rights Act of 1964 the due process clause has been extended to protect individuals from infringements by other individuals upon at least important aspects of "life, liberty, or property."[217]

Again, it may be argued that if "equal protection of the laws" is to be fully applied to the unborn, no special law of homicide can be adopted in regard to them. Thus, an abortion would have to be treated as murder. I would not personally consider the consequence utterly repugnant, if it necessarily follows. Certainly it is in the spirit of equality before the law. Yet I think that a distinction, such as I suggested earlier, between simple homicide and homicide of healthy adults can be made without violating the requirement of equal protection. The law would defend all persons' lives equally so far as the malice of killing them consisted in its violation of their right to life. The criminal law can discriminate, particularly as to the seriousness of offenses, in its handling of different crimes, provided that there is a reasonable basis for the distinction. But to allow some persons to be killed with total impunity is to deprive them of equal protection of the laws.

Another type of objection that might be raised against the position I have taken is less technical. Someone might argue that the status of the unborn as *persons*, though not an impossibility, is clearly not a certain fact. If the law insists on the right to life of the unborn, then, even against other conflicting claims, such as the woman's liberty to refuse to bear the child, it seems that an uncertain possibility is being allowed to prevail over a certainty.

An argument such as this, while plausible on its surface, is fallacious. The legal status of the unborn as persons is a matter for legal determination. This legal determination is based on relevant empirical facts that are certain: namely, that the unborn are living, human individuals. Whether the unborn are persons in some metaphysical or theological sense is beyond the competence of the law to decide. This question is not a factual uncertainty; it is simply not a matter of fact at all. I have not argued that the law should protect the rights of the unborn on the gamble that they might be persons, as if the issue were a doubt about fact that would eventually be resolved one way or the other. Rather, I have argued that the law must regard the unborn as persons because there is reasonable ground for regarding them as such, and to regard them otherwise would be to impose upon them a particular metaphysical theory to facilitate allowing them to be killed with the approbation of the law.

A different problem is presented for the law when there is a doubt of fact. If it is doubtful whether or not human beings will be killed by a certain action, the law may regulate that action but need not wholly prohibit it if the loss of life is merely an unlikely possibility. Thus the law need not prohibit prizefighting, although now and then a boxer lands a deadly blow. Whether such a practice which the law permits is morally acceptable or not is another question. Again, if there is a mine accident with the entrapment of workers and a fire which threatens to spread, the law need not forbid flooding the mine after there is no *reasonable possibility* that any of the men survives.

Absolute certainty that the act will not destroy a human life is too much to demand. When human life is not intentionally destroyed, the law can permit some acts that may possibly kill someone, so long as that consequence is not likely. But even in such cases, the permitted act should be conditionally forbidden; it should be allowed only if there are reasons weighty enough in the common estimation of reasonable people to justify the risk to life that is permitted to be run.

These considerations are relevant to problems involving the use of certain methods of birth control, such as the ordinary "pills" and IUDs. I discussed medical evidence concerning the possibly abortifacient action of such methods in chapter three and applied my ethical conclusions regarding abortion to these methods in chapter six.[218] How should the law regard such techniques?

On the basis of present knowledge, no one could be convicted under a homicide statute that required proof of the actual killing of a living individual if any of the present (1969) methods of birth control were used. Nor could anyone be convicted under such a statute for using a "morning-after pill," since it would be impossible to prove that a life had been taken.

At the same time, statutes forbidding attempts at abortion (and abortifacient-type acts whether the mother is pregnant or not) clearly forbid the use of methods designed to act after conception. This means that a "morning-after pill" would be forbidden by most existing abortion statutes.[219] I believe this prohibition is as it should be, and that no license should be given to manufacture and distribute such abortifacients. Their use should not be allowed merely because they superficially resemble contraceptives more than they do other methods of abortion. If conception is the line that marks the beginning of the legal person, then no "small incursions" can be tolerated.

The existing "pills" present a different problem. I do not think their use is morally acceptable because of their possibly abortifacient effect. But since the law may not forbid contraception, a certain risk of possible abortifacient effect must be legitimate. On the basis of the present evidence, I do not think that present hormonal birth control drugs can be legally forbidden.

The IUD presents a third problem. I think the existing evidence indicates a large possibility, even a probability, that this technique is abortifacient. I do not see legal justification for permitting the use of the IUD, because the risk that human beings are killed by it is high and there is no overwhelming need to accept that risk. To offer this judgment at the present time is perhaps hopeless, because those promoting the IUD have artfully concealed its real significance, as we saw in chapter three, and it is now generally accepted as a "contraceptive"—"conception," "pregnancy" and other words having been redefined to this end.

Therapeutic Abortion?

May the law permit abortion to save the life of the mother? If the one to be aborted has a right to life equal to that of its mother, can a therapeutic exception be accepted? I think that a strictly limited therapeutic exception is not unjust. The law cannot stand upon any theological or ethical theory justifying this exception, without illicitly establishing that theory as a common faith. But almost all citizens, whatever their beliefs, agree that therapeutic abortion is justified at times. Very few, whatever they believe with regard to the morality of the act, would wish to have the law forbid abortion when without it both mother and child would die. The question is how the therapeutic exception can be legally justified. If we are not clear about its justification, the exception is open to endless abuse and extension–which has, in fact, occurred in recent years.

It has been suggested that the therapeutic exception can be based upon the principle of "legal necessity." According to at least one view of this principle, expressed in the Report of the Governor's Commission in New York State, the violation of a law is permissible and excusable if necessary to preserve life, and even an act that would otherwise be homicide is excusable if it is a necessary means for saving as many lives as possible.[220] Yet it is by no means clear that "duress of circumstances" (another name for "necessity") extends to taking life. Most acts that would otherwise be criminal have been excused if necessary to *preserve* life, but homicide itself does not seem to have been held excusable on this ground. There are few cases and these yield a negative result.[221]

Where the law permits the excuse of necessity, there need be no exception or "justifying" condition stated in the statute. In including such an exception, American statutes on abortion seem to imply that "legal necessity" was not operative. In the British statutes prior to 1967, no therapeutic exception was explicitly stated. One might develop an argument on this basis that if therapeutic abortion was legal in Britain, prior to the Bourne case, it was so on the basis of necessity. But the concept of legal necessity was not invoked in that case so far as the report of the judge's instruction reveals. Instead, the appeal was to the use of the word "unlawfully" in the abortion statute itself, and to the inclusion of an explicit exception in another statute.[222]

I think that what is needed in this matter is a more careful reconsideration of the entire question of excusable homicide, not merely the problem involving the unborn. When life is at stake, is it just to excuse an act which destroys another innocent life? Bearing in mind the fact that law cannot require all that is morally demanded and cannot enforce any single moral theory, I think we must admit that the law could justly excuse homicide in certain conditions.

One of these situations, the most obvious, is killing one or some when otherwise it is reasonably certain that all or more will die. I would not accept such a general principle as morally sound, since its ethical rationale would be utilitarian. But I think that since life is at stake in any case, the common judgment may be accepted as the appropriate criterion of what life is to be saved and what sacrificed.

I do not think most people would approve a general principle excusing the destruction of innocent life for purposes less than the immediate preservation of life itself. If it were possible to save many lives by medical experimentation on a few unwilling victims, I think few would hold that law should regard such homicide excusable, however useful it might be, because there would be no immediate preservation of life. If it were possible immediately greatly to benefit the health of one person by sacrificing the life of another—for example, curing one man's heart disease by giving him another *living* person's heart—I think few would wish to excuse the homicide; unless, perhaps, the victim were able to consent and did freely consent.

If this general discussion is applied to the unborn, it seems to me few abortions could be legally excused. Assuming that the unborn are legal persons with all the rights of other persons, the extension of the therapeutic exception to the protection of the mother's health, to defective children, and to situations involving socioeconomic factors, illegitimacy, and the like are clearly excluded.

The victim who conceives a child as a result of rape presents a special difficulty, because it is hard to find any parallel case not involving an unborn child. I should hope that standards of respect for the rights of unborn persons would lead society to a consensus against abortion in such cases, but the present sentiment seems to be the contrary. If the child were clearly perceived as a person having his own right to life, I think that despite great compassion for its mother's misfortune, we would sense the injustice of killing the offspring of a violation, when the violation occurred before the one to be killed began to be.

But in the present situation, I would hesitate to condemn as unjust a legal provision which permitted victims of *forcible rape who subsequently conceived as a consequence of that rape* to obtain an abortion. Many people believe that there is in this situation a conflict of rights more severe than that between the life of the unborn and the health of the mother. Granted that such fundamental rights are in conflict here, as people seem to believe, a legal system such as ours must establish a rule of resolution not on the basis of any single moral or religious theory but on the general consensus of reasonable people. However, such consensus should establish rules for resolving conflicts which will apply equally to all persons, not rules which discriminate against any group on grounds such as race, age, state of health, or the condition of living within the uterus or outside it.

The prompt medical treatment of all victims of forcible rape might render conception very unlikely. If such treatment involved procedures which might possibly be abortifacient but were not certainly so, this possibility might justly be admitted by the law, whatever its moral justifiability.

If a strictly limited therapeutic exception and an exception in cases of pregnancy through forcible rape are to be allowed, however, the abortion should not be performed without a suitable legal process. No review by a group of physicians acting as a hospital abortion committee would meet the essential requirements of due process. I have already outlined the elements of due process, and some sort of court hearing seems indispensable. The problems involved because of the time-factor are not beyond the possibility of legal ingenuity to resolve, if we bear in mind that a person's life is at stake.[223]

One thing is certain. If the unborn individual is accepted as a legal person, then abortion could never be justified or justifiably excused in those cases (which constitute almost all) in which the very purpose of the operation is to get rid of the child. Any abortion that could be justifiably excused would have to be one in which what is unbearable is the state of pregnancy itself, not the child to be borne. This condition is fulfilled only in those cases in which the child in the womb would be cared for and raised if an artificial uterus were available. Some cases in which the mother's health is affected by pregnancy, as well as cases involving her life, and conceptions resulting from forcible rape might meet this condition.

But I would not say that all cases that meet this condition should be excused. The law should not only forbid homicide committed for its own sake, but should also forbid it to be done for any (or almost any) other reason, however good. There is a grave danger, as history amply attests, that a narrowly conceived and formulated therapeutic exception will be stretched to permit abortion for all sorts of relatively trivial reasons. The concept of health is particularly dangerous, because it is attached to the plausible excuse of life at stake on the one hand and, on the other, to the general well-being of the woman and her family.

Probably the most important point to notice in regard to the word "health" in discussions of indications for abortion is that although there is an indistinct boundary between saving life and protecting health, not everything on the side of health is proximate to life. Morning sickness is an illness of a sort; it is no part of what we mean by "health." But no one dies of it either. "Pernicious vomiting" used to be an indication for abortion, but it ceased to be so when physicians found a way of treating it without inducing abortion.

Notes for Chapter Seven

1. Charles P. Kindregan, "Abortion, the Law, and Defective Children: a Legal-Medical Study," *Suffolk University Law Review*, 3 (1969) 232. Reprinted as *Abortion, the Law, and Defective Children* (Washington: Corpus Papers, 1969).

2 Immanuel Jakobovits, "Jewish Views on Abortion," *Western Reserve Law Review*, 17 (1965) 496.

3. *Ibid.*, 482-483.

4. Herman Schwartz, "Abortion and the Law," (New York: Association for the Study of Abortion), leaflet, 4.

5. "The No. 2 Moral Issue of Today," *America*, March 25, 1967, 452-453.

6. "German Church Centers Fight Abortion Rise," Religious News Service, Sept. 12, 1963.

7. "Danish Lutheran Says Abortion Is Murder," N.C. News Service (foreign), July 8, 1965.

8. State of New York, *Report of the Governor's Commission Appointed to Review New York State's Abortion Law* (March 1968) 61.

9. G.H.M., "Let's Talk It Over," *The Lutheran Standard*, June 11, 1968, 15.

10. E.g. in Florida, NC News Service (domestic), May 1, 1967; Minnesota, *ibid.*, March 15, 1969; Michigan, *ibid.*, October 10, 1968.

11. "Let's Talk Sense About Abortion," mimeograph distributed by the National Commission on Human Life, Reproduction and Rhythm, 1967.

12. In 1967 the U.S. Episcopal hierarchy approved a resolution rejecting abortions of convenience but approving relaxation along the lines of the A.L.I. proposal—NC News Service (domestic), Sept. 23, 1967.

13. "The Churches Speak," *Trends*, 1 (1967) 16.

14. *New York Times*, Feb. 23, 1967.

15. Quoted by Robert F. Drinan, "Contemporary Protestant Thinking," *America*, December 9, 1967, 713.

16. *Ibid.*, 714.

17. Louis Henkin, "Morals and the Constitution: the Sin of Obscenity," *Columbia Law Review*, 63 (1963) 408-411.

18. 367 U.S. 488 (1961) at 495 n. 11.

19. Paul Ramsey, "Some Terms of Reference for the Abortion Debate," manuscript based on paper delivered at the Harvard-Kennedy Conference (Washington, D.C.: September 6-8, 1967), 7.

20. *Ibid.*

21. *Supra*, pp. 241-242.

22. Charles F. Westoff, Emily C. Moore, and Norman B. Ryder, "The Structure of Attitudes Toward Abortion," *Milbank Memorial Fund Quarterly*, 47 (1969) 16.

23. Felix S. Cohen, *Ethical Systems and Legal Ideals* (Ithaca, N.Y.: Great Seal Books, 1959), 261.

24. Alice S. Rossi, "Public Views on Abortion," mimeograph (Chicago: Committee on Human Development, 1966), 11 and 26.

25. *Supra*, pp. 237-238, 241.

26. Letter to the Editor, *New York Times*, March 23, 1966.

27. *Supra*, pp. 237, 245-246.

28. Lord Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1959).

29. Roy Lucas, "Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes," *North Carolina Law Review*, 46 (1968) 732, 736.

30. H. L. A. Hart, *Law, Liberty and Morality* (New York: Vintage Books, 1963), 32, 44, 45.

31. Charles E. Rice, *The Vanishing Right to Live* (Garden City, N.Y.: Doubleday & Co., Inc., 1969), 134, 167.

32. Cf. Donald A. Giannella, "The Difficult Quest for a Truly Humane Abortion Law," *Villanova Law Review*, 13 (1968) 291-302.

33. Lucas, *op. cit.*, 737.

34. Lawrence Lader, *Abortion* (Indianapolis: Bobbs-Merrill Co., Inc., 1966), 165.

35. Giannella, *op. cit.*, 298.

36. *C.B.S. Reports*, "Abortion and the Law," broadcast on C.B.S. television, April 5, 1965, mimeograph, 25.

37. Address reported in *New York Times*, Feb. 14, 1967 at 32c.

38. Glanville Williams, "Euthanasia and Abortion," *University of Colorado Law Review*, 38 (1966) 196. I have omitted a footnote in which Williams refers to wrongful death actions and brushes them aside.

39. I. Augusti, *Corpus Iuris Civilis: Digesta*, Lib. I, tit. 5, s. 26.

40. The Earl of Bedford's Case, Michaelmas Term, 28 and 29 Eliz., 4 Coke 7 f. 7 (1586); Wilson ed., 77 Eng. Rep. 421 (1777).

41. Trower v. Butts, 1 Sim. & Stu. 181, 57 Eng. Rep. 72, 73 (Ch. 1823).

42. Hall v. Hancock, 32 Mass. (15 Pick.) 255 (1834).

43. M'Knight v. Read, 1 Whart. 213 (Pa. 1835).

44. In Re Well's Will, 129 Misc. 447, 221 N.Y.S. 714 (Sur. Ct. 1927).

45. The Matter of Peabody, 5 N.Y. 2d 541, 158 N.E. 2d 841, 186 N.Y.S. 2d 265 (1959).

46. Gore v. Gore, 2 P. Wims. 28 (1722) cited by Cyril C. Means, Jr., "The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: a Case of Cessation of Constitutionality," *New York Law Forum,* 14 (1968) 421-422.

47. Wallis v. Hodson, 2 Atk 114 at 117, 26 Eng. Rep. 472 at 473 (Ch. 1740); decision in case cited note 42 *supra* refers to this one and cites passage.

48. Doe *idem* Clarke v. Clarke, 2 H. Bl. 399, 126 Eng. Rep. 617 (C.P. 1795).

49. Thellusson v. Woodford, 4 Ves. 227, 31 Eng. Rep. 117 (Ch. 1798).

50. 61 R.I. 169, 200 A. 467 (1938).

51. Barnett v. Pinkston, 238 Ala. 327, 191 So. 371 (1939).

52. 199 Cal. 391, 249 P. 517 (1926).

53. 144 N.C. 110, at 110-111, 56 S.E. 691 at 692 (1907).

54. William L. Prosser, *Handbook of the Law of Torts,* 2d ed. (St. Paul, Minn.: West Publishing Co., 1955), 705-711.

55. John L. Hay, "The Law of Prenatal Injuries," *University of Colorado Law Review,* 37 (1965) 274.

56. Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

57. Walker v. Railway Co., 28 L. R. Ir. 69 (1891).

58. Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900).

59. *Ibid.*, N. E. at 641.

60. 33 Cal. App. 2d 629, 92 P. 2d 678 (1939), *hearing denied* 93 P. 2d 562 (1939).

61. Stemmer v. Kline, 128 N.J.L. 455, 26 A 2d at 687 489 (Ct. Err. & App., 1942).

62. Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

63. Montreal Tramways v. Leveille, 4 Dom. L. R. 337 (1933).

64. Lipps v. Milwaukee Ry. & Light Co., 164 Wis. 272, 159 N.W. 916 (1916).

65. Williams v. Marion Rapid Transit, Inc., 152 Ohio 114, 87 N.E. 2d 334 (1949).

66. Smith v. Brennan, 31 N.J. 353, 157 A. 2d 497 (1960).

67. Sylvia v. Gobeille, 220 A. 2d 222 (R.I. 1966).

68. David A. Gordon, "The Unborn Plaintiff," *Michigan Law Review,* 63 (1964-65) 590; note 67 lists citations of cases in eight states.

69. 282 App. Div. 542, 125 N.Y.S. 2d 696 (1953).

70. David W. Louisell, "Abortion, the Practice of Medicine and Due Process of Law," *UCLA Law Review,* 16 (1969) 241.

71. Gordon, *op. cit.,* 589.

72. 9 & 10 Vict. c.93.

73. Prosser, *op. cit.,* 709-710.

74. Gordon, *op. cit.,* 594-595.

75. Stokes v. Liberty Mutual Life Ins. Co., 213 So. 2d 695 (Fla. 1968).

76. Goodrich v. Moore, 155 N.W. 2d 247 (Mich. 1967).

77. Norman v. Murphy, 124 Cal App. 2d 95, 268 P. 2d 178 (1954).

78. Gay v. Thompson, 266 N. C. 394, 146 S. E. 2d 425 (1966); Graf v. Taggert, 43 N.J. 303, 204 A. 2d 140 (1964).

79. *Loc. cit.* note 45 *supra.*

80. Verkennes v. Corniea *et al.,* 229 Minn. 365, 38 N.W. 2d 838 (1949).

81. Thomas F. Lambert, Jr., "The Legal Rights of the Fetus," in *Birth Control and the Christian,* ed. Walter O. Spitzer and Carlyle L. Saylor (Wheaton, Illinois: Tyndale House Publishers, 1969), 390.

82. Mitchell v. Couch, 285 S.W. 2d 901 (Ky. 1955).
83. Kentucky Rev. Stats., Sec. 411.130.
84. Hatala v. Markiewicz, 26 Conn. Sup. 358, 224 A. 2d 406 (1966).
85. 352 Mass. 446, 225 N.E. 2d 926 (1967).
86. Porter v. Lassiter, 91 Ga. App. 712, 87 S.E. 2d 100 (1955).
87. Georgia Code, 105-1307 (1952).
88. Cf. Gordon, *op. cit.*, 594-595.
89. Morgan v. Susino Const. Co., 130 N.J.L. 418, 33A. 2d 607 (1943).
90. La Blue v. Specker, 358 Mich. 558, 100 N.W. 2d 445 (1960).
91. Herndon v. St. Louis & S.F. R.R., 37 Okla. 256, 128 P. 727 (1912).
92. Texas & P. Ry. v. Robertson, 82 Tex. 657, 17 S.W. 1041 (1891).
93. Nelson v. G. H. & S. A. Ry. Co., 78 Tex. 621, 14 S.W. 1021 (1890).
94. Metzger v. People, 98 Colo. 133, 53 P. 2d 1189 (1936).
95. Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P. 2d 806.
96. Hoener v. Bertinato, 67 N.J. Supp. 517, 171 A. 2d 140 (1961).
97. 42 N.J. 421, 201 A. 2d 537, *cert. denied*, 377 U.S. 985 (1964).
98. *Supra*, pp. 186-193.
99. Cordes v. State, 54 Tex. Crim. 204, 112 S.W. 943 (1908).
100. Clarke v. State, 117 Ala. 1, 23 So. 671 (1898); Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923).
101. Means, *op. cit.* note 46 *supra*, 443 ff.; cf. William Diller, "The Unborn Child: Consistency in the Law?" *Suffolk University Law Review*, 2 (1968) 231 note 22.
102. Means, *op. cit.*, 445-446, realizes that this phrase does not limit, and properly criticizes George's interpretation, but Means does not see the full significance of including the phrase, although it is non-limiting.
103. B. James George, Jr., "Current Abortion Laws: Proposals and Movements for Reform," *Western Reserve Law Review*, 17 (1965) 380.
104. Smith v. State, 33 Me. 48, 55 (1851).
105. State v. Murphy, 27 N.J.L. Rep. 112 (Sup.Ct. 1858).
106. Lamb v. Maryland, 67 Md. 524, 533, 10 A. 298, 300 (1887).
107. State v. Cooper, 22 N.J.L. 52 (Sup.Ct. 1849).
108. Foster v. State, 182 Wis. 298, 196 N.W. 233 (1923).
109. State v. Ausplund, 86 Ore. 121, 167 P. 1019 (1917), *error dismissed*, 251 U.S. 563 (1919).
110. Wisconsin Stat. Ann., Sec. 940.04-6 (1958).
111. Association for the Study of Abortion, *Newsletter*, (1969) 1.
112. In this connection it may be noted that the classic definition of abortion in Roman Catholic canon law defined the crime (not *sin*) of abortion as the expulsion of a pre-viable, animated fetus, with death subsequent to live birth; the Code of Canon Law (cf. n. 2350) retains this idea except that "animated" was removed in the 19th century.
113. NC News Service (foreign), May 28, 1969.
114. An Address at Free Trade Hall, Manchester, England, Dec. 5, 1966.
115. Lucas, *op. cit.* note 29 *supra*, 732.
116. *Ibid.*, 731-732.
117. The statutes in question may be found in Eugene Quay, "Justified Abortion: Medical and Legal Foundations," *Georgetown Law Journal*, 40 (1960-1961) 447-519.

118. *Supra*, p. 188.

119. Quay, *op. cit.*, 478.

120. *Ibid.*, 514.

121. Means, *op. cit.* note 46 *supra*, 443-449.

122. *Ibid.*, 449.

123. *Ibid.*, 451-453.

124. *Ibid.*, 506.

125. *Ibid.*, 451.

126. *Supra*, pp. 163 and 190.

127. *Supra*, pp. 186 and 191.

128. Means, *op. cit.*, 452.

129. See Quay, *op. cit.*, 496.

130. State v. Murphy, 27 N.J.L. 112 (Sup.Ct. 1858).

131. State v. Cooper, 22 N.J.L. 52 (Sup.Ct. 1849).

132. Quay, *op. cit.*, 497.

133. Means, *op. cit.*, 461.

134. *Ibid.*, 454-459.

135. *Ibid.*, 463.

136. Evans v. the People, 49 N.Y. 86 (1872); Means, *op. cit.*, 465-487.

137. *Ibid.* at 90.

138. N.Y. Gen. Stats., ch. 181, secs. 1-4 at 71 (1872).

139. Means, *op. cit.*, 487-488.

140. *Ibid.*, 490-491 in notes 201-202.

141. *Ibid.*, 490.

142. *Supra*. p. 163.

143. Means, *op. cit.*, 500.

144. *Ibid.*, 492.

145. Quay, *op. cit.*, 504, 483-484, 517, 519, 507, 457, 462; Kansas (474), Missouri (490), and New Hampshire (493) had somewhat similar statutes, but not equal penalties.

146. Means, *op. cit.*, 448.

147. George, *op. cit.* note 103 *supra*, 380-381, suggests that the abortionist could be indicted for second degree murder or manslaughter if there is no special provision in the abortion statute.

148. See notes 129-131 *supra* and accompanying text.

149. According to Quay's compilation, *op. cit.*, 481, 494 and 515.

150. George, *op. cit.*, 381; texts of statutes may be found in Quay.

151. Evans v. the People, 49 N.Y. 86 at 89-90 (1872).

152. Means, *op. cit.*, 509; Lucas, *op. cit.* note 29 *supra*, 731-735.

153. Mills v. Commonwealth, 13 Pa (1 Harris) 631, 633 (1850).

154. Means, *op. cit.*, 509.

155. Cited note 151 *supra*.

156. *Supra*, pp. 186 and 191.

157. Mitchell v. Commonwealth, 78 Ky. 204, 39 Am Rep 227 (1879).

158. Quay, *op. cit.*, 474-476.

159. *Ibid.*, 467.

160. *Ibid.*, 513.

161. *Ibid.*, 487-488.

162. *Ibid.*, 491-492.

163. La Blue v. Specker, 358 Mich. 558, 100 N.W. 2d 445, 450 (1960); Miller v. Bennett, 190 Va. 112, 56 S.E. 2d 217 (1949); 21 N.J. 249, 121 A. 2d 490 (1956).

164. Gleitman v. Cosgrove, 49 N.J. 22, 41, 227 A. 2d 689 (1967).

165. *Ibid.* at 35-36, 227 A. 2d at 696.

166. George, *op. cit.*, 579.

167. 3 All E.R. 615 (K.B., 1938); Quay, *op. cit.*, 525.

168. Ministry of Health and Home Office, *Report of the Inter-Departmental Committee on Abortion* (London: 1939), 27.

169. Glanville Williams, *The Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1957), 149.

170. American Law Institute, *Model Penal Code, Tentative Draft No. 9* (Philadelphia: May 8, 1959), 148.
171. People v. Chevez, 77 Cal. App. 2d 621, 176 P. 2d 92 (1947).
172. O'Beirne v. Superior Court, 1 Civ. 25174 (Sup. Ct. of Cal., Dec. 6, 1967).
173. Rice, *op. cit.* note 31 *supra*, 35-36.
174. Means, *op. cit.*, 441-443.
175. *Op. cit.* note 8 *supra*, 57.
176. Cited by Gordon, *op. cit.*, 582.
177. California Penal Code, secs. 3705-06 (West 1954).
178. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).
179. Williams v. State, 46 Misc. 2d 824, 260 N.Y.S. 2d 953 at 959.
180. New York *Times*, June 26, 1965.
181. 25 A.D. 2d 908, 269 N.Y.S. 2d 787.
182. 276 N.Y.S. 2d 885 at 887.
183. Gleitman v. Cosgrove, 49 N.J. 22, 227 A. 2d 689 (1967).
184. *Ibid.*, at 693.
185. *A.M.A. News*, January 13, 1969.
186. *Op. cit.* note 55 *supra*, 276.
187. *Ibid.*, 277; quotation cited to Cook, *The Logical and Legal Basis of Conflict of Laws*, 159 (1942).
188. *Op. cit.* note 101 *supra*, 228.
189. See notes 153 and 157 *supra* and accompanying text.
190. See note 56 *supra* and accompanying text.
191. New York Law Revision Commission, "Communication to the Legislature Relative to Prenatal Injuries," January 23, 1935 at 6, note 4.
192. 56 N.E. 641.
193. 124 Tex. 347, 78 S.W. 2d 944 (1935).
194. Leal v. C. C. Pitts Sand and Gravel, Inc., 419 S.W. 2d 820 (Texas 1967).
195. Stemmer v. Kline, 128 N.J.L. 455, 468, 26 A. 2d 489 at 688 (1942).
196. Bonbrest v. Kotz, 65 F. Supp. 138 at 140-141 (D.D.C. 1946).
197. Verkennes v. Corniea, 229 Minn. 365, 38 N.W. 2d 838 at 840 (1949).
198. Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S. 2d 696 at 698 (1953).
199. Porter v. Lassiter, 91 Ga. App. 712, 87 S.E. 2d 100 (1955).
200. 208 Ga. 201, 65 S.E. 2d 909 (S.Ct.Ga. 1951).
201. Ohio Constitution, Sec. 16, art. 1.
202. Williams v. Marion Rapid Transit, Inc., 152 Ohio 114 at 120, 87 N.E. 2d 334 at 340 (1949).
203. Mallison v. Pomeroy, 205 Ore. at 693, 291 P. 2d at 228 (1955).
204. Sherbert v. Verner, 374 U.S. 398 at 406 (1963).
205. 42 N.J. 421, 201 A. 2d 537, *cert. denied*, 377 U.S. 985 (1964).
206. See 171 note *supra* and accompanying text.
207. *Supra*, pp. 323-325, 336.
208. *Supra*, pp. 273-287.
209. "Euthanasia and Abortion," *University of Colorado Law Review*, 38 (1966) 201.
210. *Ibid.*, 200.
211. *Op. cit.* note 169 *supra*, ix-x.
212. Levy V. Louisiana, 391 U.S. 68 at 70 (1968).
213. *Supra*, pp. 283-286, 303.
214. "Euthanasia and Abortion," 198.
215. Gulf, Colorado, and Santa Fe Railway v. Ellis, 165 U.S. 150 (1897); Yick Wo v. Hopkins, 118 U.S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220 (1886).
216. *Op. cit.* note 70 *supra*, 250-253.
217. Note signed J.T.S., "In Defense of the Right to Live: the Constitutionality of Therapeutic Abortion," *Georgia Law Review*, 1 (1966-67) 699-700.
218. *Supra*, pp. 107-115, 344.
219. Sybil Meloy, "Pre-Implantation Fertility Control and the Abortion Laws," *Chicago-Kent Law Review*, 41 (1964) 183.

220. *Op. cit.* note 8 *supra,* 72.
221. Rollin M. Perkins, *Criminal Law* (Brooklyn: The Foundation Press, Inc., 1957), 849.
222. *Supra,* pp. 220-222.
223. *Op. cit.* note 70 *supra,* 250-253.

LAW, MORALITY, AND THE HATCH AMENDMENT

W. H. MARSHNER

In the mid-1970s the pro-life movement was deeply and bitterly divided between soft-liners and hard-liners. The soft-liners didn't want to call abortion murder; they were afraid to interfere with abortifacient drugs and devices, which they prefered to consider contraceptives; they wanted to permit exceptions for "hard" cases or else settle for a "states' rights" Amendment. Against these compromisers, we of the *Wanderer* Gang waged a protracted battle for the soul of the pro-life movement. It was not a fight over tactics but over moral substance, and we won it. Today no politician can hope to garner pro-life support by advancing the Noonan Amendment or by playing games with the meaning of 'conception.'

Now our movement is divided again, and the division is becoming daily more bitter. We all realize that the ratification of a definitive Human Life Amendment is many years away; so we are embroiled in a three-way battle over interim measures. One party will accept no interim measure except the Helms-Hyde Human Life Bill (S. 158); to this party belong many of the *Wanderer*'s readers. A second party currently supports no measure but the Hatch Amendment (S.J.Res. 110); here belong the American Catholic bishops. A third party supports both of these measures, preferring the passage of either to the passage of nothing; here belong the two-Amendment strategists, a majority of the National Right to Life Board, key leaders of the New Right, and the present writer. This three-way battle ought to be perceived as a battle over tactics; and from a fair examination of our options, a reasonable consensus ought to emerge for the benefit of the whole movement. But that's not the way things are working out.

Instead, the three-way battle is boiling down to a two-way battle, for and against the acceptability *in principle* of a Hatch-style Amendment, and the row is being perceived as a fight for moral substance, a replay of the hard-line/soft-line wars of years past.

Specifically, certain partisans of the bill-only school are accusing the supporters of the Hatch Amendment of selling out basic pro-life principles. In the November 26 issue of the *Wanderer*, in an article called "The Hatch Amendment Is Not the Answer," Prof. Charles Rice concedes the personal sincerity of the present writer and other Hatch supporters, but the objective logic of our position, he alleges, drives us to deny the personhood of the unborn, drives us to accept the liceity of abortion whenever a legislature approves of it, and finally drives us out of the Church. He writes:

> The Hatch Amendment, with its depersonalization of the unborn child and its constitutional legitimization of legalized abortion, is at war with the authentic teachings of the Catholic Church. As the *Declaration on Procured Abortion* . . . declared, "It must in any case be clearly understood that a Christian can never conform to a law which is in itself immoral, and such is the case of a law which would permit in principle the liceity of abortion. Nor can a Christian take part in a propaganda campaign in favor of such a law or vote for it." The Hatch Amendment clearly affirms the liceity of abortion whenever a legislative majority approves it.

I pinch myself to see if I am awake. I stare again at the wording of the Hatch Amendment:

> 1. A right to abortion is not secured by this Constitution.
> 2. The Congress and the several States have the concurrent power to restrict and prohibit abortion: Provided, that a law of a State which is more restrictive than a law of Congress shall govern.

Where does it say that the unborn child is not a person? *Where* does it "clearly affirm" that an abortion is licit under any circumstances? I thought I was making it possible for Congress to protect the unborn, and behold I am depersonalizing them! I thought I was restoring to our Constitution the authority to abolish abortion, and behold I am legitimizing it!

It is time to take a hard look at the premisses from which such astounding conclusions are made to follow. Such is the purpose of this essay: it is not advocacy of the Hatch Amendment but a moral defense of it from misguided attack. There are plenty of *good* reasons to doubt the wisdom of a two-Amendment strategy in general or of the Hatch Amendment in particular -- reasons whose ventilation will benefit all of us. In this essay I am concerned with *bad* reasons. I take aim at certain deep-seated confusions which have needlessly embittered our debate.

Prof. Rice's services to the pro-life movment are of stellar quality. Some of the arguments which he has presented against the Hatch Amendment are well worth pondering. But his basic and deepest arguments, I shall contend, are bad ones.

When friends quarrel, they owe it to themselves to state each other's position as clearly as possible. As I understand Prof. Rice, his case consists of ten basic propositions, organized into three crucial inferences.

The first two inferences go together and are designed to prove that the Hatch Amendment contradicts pro-life principles regarding the state's obligation to protect unborn life. The third inference is largely independent of the first two; it purports to prove that the Hatch language excludes the personhood of the unborn child. I stress the fact that this formal arrangement of Prof. Rice's case is my work, my attempt to understand him. He is free to criticize it, and I apologize in advance if I have misunderstood. With that said, I present in logical order the propositions and inferences of which this amazing case seems to consist.

First Inference:

(1) "The 14th Amendment, properly construed, requires protection of unborn life."

(2) The Hatch Amendment asserts a power to protect the unborn but asserts no requirement to do so.

(3) Therefore, the 14th Amendment (properly construed) and what the Hatch Amendment asserts are "inconsistent."

Second Inference:

(4) "Moreover, the 14th Amendment's provisions are generalized protections of life," while "the Hatch Amendment is a particularized provision specifically governing abortion."

(5) "It is a rule of construction that a specific enactment will prevail over an inconsistent earlier general enactment on the same subject."

(6) But the Hatch Amendment is inconsistent with the 14th.

(7) Therefore, the Hatch Amendment will be construed to prevail over the 14th Amendment and hence will be construed as "a clear declaration that . . . Congress and the states have discretion rather than obligation to protect unborn life."

Third Inference:

(8) "To the extent that one's right to life is subject to legislative discretion, he is a nonperson."

(9) But under the Hatch Amendment, the Congress and the states will have discretion to protect the right to life of the unborn.

(10) Therefore, "the Hatch Amendment wholly accepts the basic premise that the unborn child is a nonperson."

I shall show that the first two Inferences equivocate on 'inconsistent' and that neither of them is valid. I shall show that their conclusion, (7), is false both as it stands and in a milder version. Then, turning to the Third Inference, I shall show that even if (9) is true, it is still not the case that (10) follows, because there is a great deal wrong with premise (8).

Now, before I take up these refutations, let us check to make sure that these ten propositions, organized into these three Inferences, really form the basis for Prof. Rice's most surprising and distinctive charges.

First, from conclusion (10) plus the obvious fact that Hatch's language is intended to be a Constitutional Amendment, we get this distinctive charge:

> "The Hatch Amendment not only accepts the basic nonpersonhood principle of Roe v. Wade. It aggravates that problem by writing that principle into the language of the Constitution itself."

Then, from the same conclusion (10), plus the well-known fact that prolifers must assert the personhood of the unborn in order to prove the sanctity of embryonic life, we get another distinctive charge:

> The Hatch Amendment "would prevent us from making the argument that all life is inviolably sacred" and therefore "must be protected even in its earliest stages."

Whence if follows immediately that

> The Hatch Amendment "constitutionalizes" a "pro-abortion attitude,"

and that

> "To achieve ratification of Hatch the energies of the right-to-life movement would have to be devoted to the propagation of the basic principle of Roe v. Wade, that the unborn child is a nonperson. The movement would be educati~~o~~ng the American people to think, not that life is an unalienable gift of God, but that the unborn child is disposable in that his killing can be authorized by legislative majorities,"

so that

> "The effort to gain ratification of Hatch would be a corrupting influence in American society."

Next, take Prof. Rice's basic three Inferences and add to them this piece of speculation about what Congress would be likely to do, once the Hatch Amendment was ratified:

> "Congress would know that its legislation would be a minimal standard. . . . And Congress would be legislating for the protection of a constitutionally defined nonperson. This minimal standard enacted by Congress would tend to become the norm rather than the minimum. States would tend to include the exceptions provided by Congress."

He is now ready to infer another distinctive charge:

> "In practical terms, the Hatch Amendment would ensure that legalized abortion, to a greater or lesser degree, would be a permanent part of the American system."

Add together this last charge plus conclusion (10) plus a misused quotation from the Vatican Declaration on Procured Abortion, and we get the amazing charge with which we started:

> "The Hatch Amendment, with its depersonalization of the unborn child and its constitutional legitimization of legalized abortion, is at war with the authentic teachings of the Catholic Church," etc.

The inventory is complete: all of Prof. Rice's most distinctive and most amazing charges against the Hatch Amendment flow naturally and directly from the three Inferences which were picked out above. We may be certain that, if the Inferences are refuted, the charges will collapse. I proceed to the refutation.

I. First Inference: Is Hatch Inconsistent with the 14th Amendment?

The question of inconsistency will not arise, and cannot arise, for any American Court as matters now stand. In a terrible blunder, the Supreme Court has construed the 14th Amendment as saying nothing whatever about unborn children. Hence, in the Court's view, the 14th Amendment and the Hatch Amendment will be *logically independent* rather than inconsistent.

But we are concerned here with the *proper* way of construing the 14th Amendment. Its Due Process Clause provides that no state shall "deprive any person of life . . . without due process of law." It is uncontroversial that an individual human being is a person. It is scientifically and philosophically certain that an unborn child, from the moment of fertilization onward, is an individual human being. Therefore, the Clause ought to be read as including the unborn as persons; and so construed, the Due Process Clause does place a requirement on the states: it requires them to abstain from any state action which would deprive unborn children of life without due process of law. *This* "proper construction" and *this* requirement the Human Life Bill would restore.[1] But this is not the "proper construction" talked about by Prof. Rice in his starting premise, namely,

> (1) "The 14th Amendment, properly construed, requires protection of unborn life."

The Due Process Clause, *taken alone*, does not reach to the actions of individuals. It does not require private citizens to abstain from anything, and hence it does *not require* the states to forbid those abortions which are ~~committed or~~ procured by private individuals with their own money, in private clinics, etc. In order to reach individual action, therefore, we must go beyond the Due Process Clause and invoke the Equal Protection Clause. That Clause also employs the word 'person'; it provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Prof. Rice, in the company of many eminent pro-life lawyers (but not all), feels that, if we ought to construe 'person' to include the unborn in the Due Process Clause, we ought also to construe 'person' to include them in the Equal Protection Clause. Thereby, the states will be required to give the unborn the *same protection* from every kind of injustice as they give to born children and to adults.

So, it is only by construing *both Clauses together* as including the unborn that Prof. Rice secures the "proper construction" mentioned in premise (1). Only thus does the 14th Amendment *require* the states to protect unborn life by passing appropriate criminal statutes dealing with abortion. Please keep that point in mind.

Now let us concede that premise (1) is true, *i.e.* that the 14th Amendment does indeed *oblige* the states to prohibit abortions. What follows? It follows necessarily that the states have the *power* to prohibit abortions. They cannot be required to do what they do not have the power to do. So, a statement to the effect that the states shall have this power is simply an entailment of the 14th Amendment "properly construed." But the relevant part of the Hatch Amendment is exactly such a statement. It provides that Congress and the states shall have concurrent power to restrict and prohibit abortion. Therefore the Hatch Amendment is an *entailment* of the 14th Amendment "properly construed" and cannot possibly be inconsistent with it. More precisely stated: if we had "proper construction" of the 14th Amendment by the Courts, the Hatch Amendment *as such* would not exist, of course, but what it says about the states would be true as a matter of course, and what it says about the Congress would be a simple federalization of authority, fully consistent with the 14th Amendment.

So, if Prof. Rice's premises (1) and (2) are true, his conclusion (3) does not follow. Rather, its contradictory follows. *As to what they say*, the two Amendments are logically consistent. His First Inference is therefore invalid, and his claim (3) is false.

Now, forgive me if I am wrong, but I think I hear the wheels of the reader's mind turning. I think I hear an objection which goes like this. Power-to-act and obligation-to-act are consistent, if you mean power-at-least, but not if you mean power-at-most. Having *at most* the power to act is mere discretion, and it contradicts obligation.

True enough, I answer, but don't put foreign words into Hatch's text. It doesn't *say* "at most."

On the contrary, you rejoin, it doesn't need to say it. The Amendment's very existence shouts it. Now watch: over here is the Constitution, with the 14th Amendment already in it. So the obligation to protect life, *with the power this obligation implies*, is law already. Now you come along and want to add another Amendment, a new Amendment, which only asserts the power to protect life. Don't you see that what you are doing makes no sense, unless precisely what you have in mind is *replacing* the obligation with the weaker thing, the mere discretionary power? In other words, the "inconsistency" that Prof. Rice has been talking about does not arise from what the two Amendments say in the abstract but arises rather from the very existence of the Hatch Amendment as a subsequent enactment.

Well done, I respond. I couldn't have said it better myself.[2] But notice that we have now changed the subject. We are no longer speaking of logical inconsistency but of *contextual* inconsistency. We have shifted from words-in-themselves to words-in-use in historical context. So the force of the objection is not to overthrow my refutation of the First Inference but rather to make that refutation seem irrelevant and trivial. In a sense, this is correct. The real business is in the Second Inference, to which we now turn.

II. Second Inference: Does Hatch Exclude an Important Obligation?

Now that the historical context is in the picture, let us be careful to keep the real context, in which *Roe v. Wade* has done its damage, separate from the ideal context in which Prof. Rice reasons, the context in which *Roe v. Wade* does not exist and the 14th Amendment has been "properly construed." For the sake of vividness, let's call the real context World I and the ideal context World II.

Let us recall that Prof. Rice's Second Inference seeks to show that the Hatch Amendment excludes an important obligation by conflicting with and prevailing over the 14th Amendment. To prove this point, he invokes a rule of legal interpretation, namely,

> (5) "It is a rule of construction that a specific enactment will prevail over an inconsistent earlier general enactment on the same subject."

So the Second Inference seeks to show *how a judge would have to reason*, if confronted with the general provisions of the 14th Amendment and the later, specific provisions of the Hatch Amendment.

Now I ask a simple question. In which *World* does a judge face this problem and invoke this rule?

Not in World I, obviously. In World I judges are reading the Constitution on the basis of *Roe v. Wade*. In World I the 14th Amendment provides *nothing* about the unborn, so that it and the Hatch Amendment have no common subject matter. The Hatch Amendment, if ratified, does not "prevail" over the 14th, because there is nothing *in* the 14th Amendment for it to prevail over. If ratified, the Hatch Amendment asserts a power and says nothing about an obligation; its existence *shouts nothing* against an obligation, because there is no obligation for it to shout against.[3]

This remains the case in World I even if we pass the Human Life Bill first. The Bill speaks to unborn life and personhood only for purposes of the Due Process Clause. As its sponsors make clear, it would not compel the states to enact criminal statutes against abortions performed or procured by private citizens. So the Bill would establish no obligation against which the Hatch Amendment could subsequently "shout."[4]

Finally, suppose that the Hatch Amendment is ratified, and *thereafter* we take steps to restore the 14th Amendment obligations which should have been in force in World I all along; suppose the new step is the Human Life Bill, or a stronger version of such a Bill, or a definitive Amendment. Would the Hatch Amendment, with its mere assertion of a power, somehow *block* this restoration of an obligation? Certainly not; for on these suppositions, the Hatch Amendment is the earlier enactment, and the new enactment prevails over *it*.

Now how about World II? Does a judge face Prof. Rice's problem, or invoke his rule, in World II? Obviously not. In World II the judges have properly applied the 14th Amendment to unborn lives in the first place, so that there is no abortion crisis. The Hatch Amendment is never proposed. It prevails over nothing, because it doesn't exist. It *shouts nothing* against 14th Amendment obligations, because it has no existence to shout with.

So in which World does Prof. Rice's Second Inference hang together? In neither World. In no *plausible* world at all. The objection to my refutation of his First Inference fails to have merit, and my refutation of his Second Inference is complete. His premises cannot come together. In no plausible, possible world are they *true* together; so they cannot yield a conclusion in any one historical context. The Inference only *seems* valid because two different contexts have been blurred together, as though a judge from World II slipped through a Black Hole and found himself in World I, confronted by the Hatch Amendment, without being aware that he had changed Worlds and switched histories!

We can now see that a conclusion absolutely vital to Prof. Rice's case, namely,

> (7) Therefore, the Hatch Amendment will be construed to prevail over the 14th Amendment and hence will be construed as "a clear declaration that . . . Congress and the states have *discretion rather than obligation* to protect unborn life,"

is a groundless illusion, born of switching back and forth between the two Worlds and blurring them together.

Nevertheless, it is undeniable that the Hatch Amendment asserts a power and does not assert an obligation. It seems to me that Prof. Rice could have chosen to argue from that very fact, leaving aside all of this business about the 14th Amendment. His essential point could have been put like this:

> (7') The Hatch Amendment asserts a power in such a way as to exclude an important obligation.

I now propose to show that even this much is false.

My question is; what obligation? If a *de facto* obligation is meant, one which is actually *in force* in the law, then alas there is no such obligation in the real world, and the Hatch Amendment has nothing to exclude. If a *de jure* obligation is meant, one which is contained in the true meaning of the law but is not factually in force, thanks to the Courts' perversity, then the Hatch Amendment has no bearing upon that obligation at all, because *it* and the Hatch Amentment are in force in different Worlds. And finally, if a *moral* obligation is meant, one which is in force in both Worlds, no matter what the law says or the judges do, then the Hatch Amendment not only does not exclude this obligation but actually helps us meet it; it gives the states the legal power to do what they are morally obliged to do!

At this point, I hear the stirrings of another objection. The Moral Law has finally been mentioned. Perhaps the reader is thinking as follows.

It is the duty of human law to reflect the Moral Law. Above all, our country's Constitution ought to reflect the Moral Law. To be sure, hu[illegible] law is never perfect; many things are morally wrong which are not crimes and which it would be inconvenient or unwise to criminalize. But we ought to do the *best we can*, especially where innocent human life is concerned. Now, setting aside all these nit-picking refutations, the Hatch Amendment is not the best we can do. It does not reflect the *moral obligation* in which we believe, the basic obligation to protect unborn human beings. Therefore, although it might be "practical" in certain ways, although it might save lives, it is just not *worthy* to be put into our Constitution. It leaves too much unsaid, and by its silence it conveys the false impression that human life is disposable, subject to the pleasure of legislative majorities.

I am moved by this objection, since it is the cry of my own Catholic heart. I will not answer it glibly by saying, "Yes, that is why the Hatch Amendment is only an interim step to a better Amendment," or by saying, "Yes, but given the current political realities, it *is* the best we can do," although I think that both those answers are sound on their own, shallow level. I have a deeper answer.

Let those who make this objection feel free to make it, but let them also recognize what things the objection tells against. It tells against the Hatch Amendment, yes; but it also tells against the Human Life Bill. The Bill would not change the words of the Constitution, but it would alter their effective meaning. Under a Bill-altered Constitution, just as much as under a Hatch-altered Constitution, *there would be no obligation* on the states to pass anti-abortion statutes. The states would be constitutionally permitted to protect unborn life but not compelled. Does such a Constitution reflect the moral obligation in which we believe? Will the effort to pass the Bill not also "corrupt" the American mind and affirm the liceity of abortion in principle whenever the legislature declines to act? Let's have a little fairness: this blow at Hatch is a blow at Galebach.[5]

Furthermore, the objection tells against the Paramount Amendment, the NRLC Amendment, and every other definitive Amendment we have ever considered, even though those Amendments assert a legal obligation. Why do I say this? Because a legal obligation does not truly reflect a moral obligation unless it transcends legislative discretion. But the legal obligation which these Amendments assert, no matter how sweeping it might be, is itself subject to legislative discretion. By a vote in Congress and votes in the states, any one of these Amendments can be repealed; the obligation they assert, nullified. Subject to concurrent majority discretion, they fail to reflect the Moral Law, which no majority, whether it be simple or two-thirds or three-fourths, is permitted to repeal or amend.

In this way, the objection tells against the Constitution itself. Every protection it contains, every moral principle it seems to enshrine, is under the shadow of Article V, the shadow of amendment or repeal at the pleasure of the "Sovereign People." Try to make this Constitution reflect the Moral Law, and it turns into a trick mirror: what it reflects back at you is not the authority of God but the face of ~~Mr. Jefferson's anti-Christ,~~ the People enthroned as god.

I am quite serious. By the standard of this objection, the venerable Constitution, for all its classic wisdom, for all its practical advantages, is not worthy to be our nation's Constitution. *It* contains the principle that human life, and everything else, is subject to ultimate legislative discretion. As a result, every pro-life battle we fight *within* the American system, *under* its rules, can be criticized for carrying the corrupting implication that this principle is true.

Can we change the system? Can we amend Article V? Can we add to the Constitution a new section, containing moral principles, and exempted from Article V? If not, shall we muster the *requete*, adding to our red roses the bayonets of civil war and the red betets of *Cristo Rey*? Shall we make the Christian *Coup*?

Prof. Rice has not advocated such measures, and neither do any of the other harsh, moral critics of the Hatch Amendment. I do not blame them for their restraint. I charge them with unfairness and inconsistency. If these critics wield the moral objection in this, its full scope, against the Hatch Amendment, they must also wield it against the options *they* want to pursue. Sauce for Hatch is sauce for Helms.

The reader feels that the moral objection has been pressed further than he wanted it to go. All right, but where we want it to stop and where its logic drives us are two different things. The whole route we have just traversed was in the logic of this objection because of one word and one mistake. The word was 'reflect.' It was at once too strong and too vague.

The mistake was that we didn't distinguish the different levels of human law. We didn't distinguish between the Constitution itself and the statutes passed under it; we held them both to the same standard; in fact, we demanded that the Constitution reflect the Moral Law more perfectly than the statutes passed under it. I'm afraid we weren't thinking very clearly when we did that.

The Moral Law forbids sexual acts involving minors. We expect state laws and local ordinances to reflect the Moral Law by criminalizing such acts. Indeed, it is their moral obligation to do so. But the Constitution does not oblige the states and localities to criminalize these acts; and, admit it, dear reader, until this very moment, you never expected the Constitution to do so. You were perfectly happy that the Constitution gave the states the mere power to do this. You were happy until I spoiled it. Now you are not so sure. Admit it: we do not hold the Constitution itself and the statutes passed under it to the same standard; we expect those statutes to reflect the Moral Law more perfectly than the Constitution does. Where moral and social issues are concerned, ~~our general rule is not to hold all levels of human laws to the same standard.~~ Our general rule is to require the Constitution itself to permit, and to require the statutes passed under it to do more than permit, i.e. to oblige or forbid. It is a rule of subsidiarity.

Now look: either you accept this general rule or you don't.

If you accept it, you have no moral case against the Hatch Amendment. It makes the Constitution do what it is morally obliged to do, namely, permit the states to do their own moral duty, which is to forbid abortion. In fact, the Amendment does better than that since it limits the discretion of the states in two important ways, as we shall see below.

Also, if you accept the rule of subsidiarity, you will see the true meaning of that passage from the Vatican Declaration on Procured Abortion:

> It must in any case be clearly understood that a Christian can never conform to a law which is in itself immoral, and such is the case of a law which would admit in principle the liceity of abortion.

What could be more obvious than that this teaching has to do with liberalized abortion statutes? A Christian cannot "conform" to such a statute, because a Christian cannot perform or cooperate in the abortions which the liberal statute permits.[6] The Hatch Amendment is not such a statute. Neither morally nor legally does it "permit" any abortions at all. What it permits are [redacted] statutes. These latter are what are moral or immoral laws by the standard of the Vatican Declaration. The fact that a Constitutional provision like the Hatch Amendment cannot possibly be the target of the Vatican statement is made clear by the very word 'conform.' No one can conform to the Hatch Amendment except Congressmen and state legislators; they would be "conforming" to the Amendment when they passed, concurrently, a total ban on abortions. Do you mean to tell me that they would be immorally conforming to an immoral law if they did that?

In other words, my way of reading the Vatican Declaration not only makes sense of what is says in context but also makes what it says consistent with the general rule of subsidiarity; as a result, both the Hatch Amendment and the Human Life Bill would be morally permissible initiatives.

By contrast, Prof. Rice's way of reading the Declaration rules out both initiatives. The Bill would also leave it up to state discretion whether or not to pass criminal statutes against abortion. Prof. Rice ought to say that the Bill also "clearly affirms the liceity of abortion whenever a legislative majority approves it." The condiment for Hatch is the condiment for Helms. And that is not the worst of it. Prof. Rice's way of reading the Declaration would forbid us to accept the general rule of subsidiarity in any important case, and hence would make it immoral for us to "conform" to the entire Constitution as it is now written. Do you suppose that a Christian can conform to any law which admits in principle the liceity of pederasty, of suicide, of euthanasia, of sodomy? Yet the Constitution has never done anything but give the states and localities discretion on these matters. Therefore, by Prof. Rice's standard, the Constitution "clearly affirms the liceity" of pederasty, suicide, etc., "whenever a legislative majority approves" of them; and we, if we "conform" to the Constitution, conform to an immoral law and find ourselves "at war" with the authentic teachings of the Church!

Still worse: by Prof. Rice's reading, God Himself is "at war" with the Church. Compare the two clauses of the Hatch Amendment with the general law of Divine Providence, the law of the Universe:

1. A right to do evil is not secured by the Constitution of this Universe.
2. Rational creatures, being free, have the power to do good.

By Prof. Rice's standard, this law "clearly affirms" the liceity of doing evil, whenever free creatures approve of doing it. It is immoral to have free will, and the sauce for Hatch is sauce for Heaven.

Now let's go back and remind ourselves of where we are. I showed that the Hatch Amendment does not exclude or "shout against" any *legal* obligation to protect unborn life. I then observed that the Amendment does not exclude our *moral* obligation to do so; on the contrary, it helps us meet this obligation by giving to us and to our elected representatives the power to ban abortions. I then considered a moral objection. In effect, the objection said that the Hatch Amendment excludes our moral obligation *by not reflecting* an obligation. I showed that this objection goes haywire; it tells against anything we could plausibly hope to do under the American system; it drives us into boot camp for the Christian *coup d' état*. I doubted that the reader was quite ready -- as yet, anyway -- to join such a muster. I then pointed out two features of the objection which we might want to amend: the use of the word 'reflect,' and the failure to observe the principle of subsidiarity in the different levels of human law. I was showing how to make these amendments, when I took a detour to show that Prof. Rice's reading of the Vatican *Declaration* would not only drive us to boot camp but drive God out of the Church. With the detour complete, let us go back to amending the objection.

Let us replace 'reflect' with the clearer and more modest phrase, 'be consistent with.' We now demand that human law *be consistent with* the Moral Law, for which it will suffice that the human law *not contradict* the Moral one. We then discriminate two levels of human law and, in keeping with the general rule of subsidiarity, we hold them to different standards of such consistency.[7] First, where Constitutional provisions are concerned, we demand simply that the law not require what is morally forbidden nor forbid what is morally obligatory. On this level, we do not put legal permission and moral obligation at odds; if the Constitution permits us to do what God requires us to do, we are normally content. But secondly, where statutes passed under the Constitution are concerned, especially state and local statutes, we demand more. On important matters which are suitable for legal enforcement, we demand that the law *not permit* what is morally forbidden. In this way, we do not tolerate a liberal abortion statute, a permissive sodomy statute, etc. Of course, there are matters which are morally serious but are not suitable for legal enforcement (whether intrinsically, because of the private nature of the acts, or extrinsically, because of the social climate); and here we may allow the law to be silent.[8]

Now isn't this a sensible view of the matter? Doesn't it reflect, not the Church's highest ideals, but the Church's constant practice in assessing the required consistency between human laws and Divine? Of course it does. The Church knows higher standards than these, I grant; she knows and remembers the full glories of Christendom. She holds the higher standards out to us as appropriate but not as a universal requirement.[9] She forbids societies which have known the higher standards to abandon them willfully (the European revolutions were social apostasy, and She condemned them), but the Church has a different attitude toward societies which have never known the higher standards or which have lost them irretrievably.

In effect, therefore, the Church puts before us two propositions:

> (A) Ideally, the American Constitution should reflect the Divine and Moral Law fully;
>
> (B) Mandatorily, the American Constitution must be consistent with the Moral Law in this sense: it must not require what is morally forbidden nor forbid what is morally required; and American statutes must be consistent with the Moral Law in a further sense: to the extent allowed by norms of reason and prudence, they must not explicitly permit what is morally forbidden.

Against the Catholic liberals and the general run of our bishops, I stand with those who embrace (A) and who will work, as history gives us opportunity, to build Christendom on these shores. And on the specific matter of abortion, where the normal arrangements of subsidiarity have broken down, yielding an unprecedented Constitutional crisis in which the very meaning of human life is at issue, I see the supreme prudence of a definitive Amendment, and I work for Hatch exactly because it, plus the Bill, is the sole effective means to that stronger solution. But against the drift of Prof. Rice, I stand with the Church in accepting (B) and in refusing to use (A) as a weapon against (B). For the fact is that the Church, through Her general teachings on the duties of citizenship, obliges American Christians to live by principle (B).[10] And common decency obliges us. The children of our neighbors are our own brothers in humanity. Our neighbors are killing their children. We cannot stand by, when the American system gives us opportunities for political action. We are morally obliged to act within that system as it is, as practically and as promptly as we can, to bring this slaughter to an end. We cannot watch children die, while we wait for impossible majorities or gather troops for a new day at the Milvian Bridge.

So let us demand that our Constitution not require what is morally forbidden nor forbid what is morally required. What follows? By this standard, the effective meaning of the present Constitution of the United States, thanks to Roe v. Wade, contradicts the Moral Law. It forbids us from doing what we are morally obliged to do. But the same Constitution, altered in its effective meaning by the Hatch Amendment, or by the Human Life Bill, or by both, will be consistent with the Moral Law. It will permit us to protect those whom we are morally obliged to protect. By this eminently sane standard, the moral objection collapses.

So my conclusion stands: because the Hatch Amendment does not exclude or block or contradict any important obligation, legal or moral, it is misleading to say that the Amendment asserts "discretion rather than obligation." The plain truth is that it asserts a power consistent with our obligations.

III. Third Inference: Does Hatch Imply Nonpersonhood?

In passing to Prof. Rice's Third Inference, we not only change the topic (from obligation to personhood) but also the constitutional theory behind his reasoning.

In evaluating pro-life measures, how should we decide whether they make the unborn to be persons in our Constitutional framework?

Up until now, the Constitutional personhood of the unborn has been a matter of their inclusion in the very word, 'person,' in the 14th Amendment. It was the duty of scientific and philosophical evidence to show the rightness of this inclusion, and in turn this rightness made the Amendment's inclusive interpretation its "true meaning," its "proper construction." So Constitutional personhood was a consequence of the sound semantics of 'person,' and the obligation of the states to protect was in turn a consequence of personhood. Call this the semantic theory.

But now the theory will turn 180 degrees. In the Third Inference, the semantics of the word 'person' itself will be set aside as irrelevant, and Constitutional personhood will become a sheer consequence of state obligation. In other words, Prof. Rice will shift to the theory that, if the legislatures are required to protect your right to life, then you are a person in the Constitution whether you are called one or not, and, vice-versa, if the legislatures are not required to protect your right to life, then you are not a person in the Constitution, even if you are called one. Call this the functional theory

The conflict between the two theories is crystal clear. In the first, Constitutional personhood requires a semantic test, and the functional test of state obligation is not necessary; in the second theory, the functional test suffices to establish personhood, and the semantic test is not necessary. Thus in the first theory, legal personhood is the reason for declaring that there is a legal obligation, while in the second theory a legal obligation is the warrant for affirming a functional or de facto personhood. Under the first theory, the Supreme Court, in the Roe and Doe cases, "depersonalized" the unborn solely and precisely by holding them excluded from the semantic range of the 14th Amendment; but under the second theory, that holding was really irrelevant, and the Court "depersonalized" the unborn solely and precisely by declining to mandate their protection. In the first theory, there is no such thing as functional personhood before the law; you either are a person (and are so called), or you are not. But in the second theory, a lawyer can posit as many kinds of functional personhood as he can invent plausible functional tests.

Prof. Rice needed the first theory in order to discredit the Hatch Amendment by comparison to the 14th "properly construed." But if he sticks to the first theory, some of his charges against Hatch will also adhere to his own prefered Amendment, the Helms-Dornan Paramount (S.J.Res. 19). Recall how it reads:

> The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health or condition of dependency.

Notice that it speaks of human beings and says they exist from fertilization but does not speak of persons. It tells us where the right to life attaches but says nothing about any of the other rights Constitutionallly secured to persons. Hence the Paramount Amendment does not restore the "proper construction" of the 14th Amendment and so, by the first theory, does not restore Constitutional personhood to the unborn. They remain nonpersons by the first theory (even though their life is obligatorily protected as a right). But Prof. Rice doesn't want to have to say this. He doesn't want to charge the Paramount Amendment with "depersonalizing" the unborn or with making them "Constitutionally defined nonpersons," as he charges Hatch. So, after having gotten what mileage he could out of the first theory, Prof. Rice abandons it.[11]

Under the second theory, Constitutional personhood is purely a relation between one's life and the appropriate legislatures. If the relation is such that those legislatures are constitutionally required to protect one's life, then one counts as a person, by the second theory. This gets the Paramount Amendment off the hook, while still allowing Prof. Rice to charge the Hatch Amendment with "depersonalization" -- though the charge now has a different sense, of course. The trouble is that, in the new sense, the charge sticks against the Bill even more squarely than it sticks against Hatch.

So, under either theory, the sauce is not being ladled out with a fair hand. You can use either theory to blast Hatch, but you need the first theory in order not to blast the Bill, while you need the second theory in order not to blast the Paramount Amendment. Given either theory, the charge that discredits Hatch also discredits one of the measures which Prof. Rice (not to mention Senator Helms) supports. Only by blurring together the two conflicting theories can one give the Hatch Amendment an appearance of sole guilt.

Having pointed out this "conflict of paradigms," let us allow Prof. Rice to settle into his second paradigm. Taking the second sense of "person" and "nonperson," let us see if we want to accept the Third Inference.

A legal power to act, unaccompanied by a legal obligation to act, is a legal discretion to act. To some extent, then, the Hatch Amendment undeniably creates a discretion, when ratified directly against the background of Roe v. Wade.

But only to some extent. It is vital to observe that this discretion is limited in two important ways. First, the Hatch Amendment obliges the states to prohibit abortion at least to the same extent that Congress does. Secondly, the Amendment declares that abortion is not a Constitutional right. Therefore, although Congress and the states would have the power to tolerate certain abortions, neither the legislators nor the Courts would have the power to declare the abortions they tolerate a matter of rights. No raped woman would have the right to an abortion; no sick or dying woman would have the right to an abortion, under the Hatch Amendment. Keep that point in mind.

Still, Prof. Rice could justly point out that a limited discretion remains a discretion. With that premise secure, he can win his Third Inference, provided that we grant him just one more premise, namely,

> (8) "To the extent that one's right to life is subject to legislative discretion, he is a nonperson,"

because it will then follow that, to some extent at least, the Hatch Amendment implies or "accepts" the nonpersonhood of the unborn child, a key holding of Roe v. Wade. So I concede that Prof. Rice's Third Inference is logically in order and that, if his premise (8) is true, his conclusion (10) is true.

The question is whether we ought to accept premise (8), and we had better not decide until we are perfectly clear on what (8) means. It is a functional criterion for nonpersonhood. It says that, if you don't enjoy such-and-such protection in the law, you are a nonperson. It is immediately obvious that certain distinctions are in order.

First, real personhood is different from this functional-legal personhood. I'm sure that Prof. Rice agrees with me (and Boethius) that real personhood is a matter of being "an individual substance of a rational nature," so that slaves and embryos, Untermenschen and "human vegetables" are real persons, whether the law accords them its protections or not. So the sort of nonpersonhood which is at issue in (8) and, indeed, throughout the Third Inference is not real nonpersonhood.

Furthermore, I'm sure that Prof. Rice agrees with me that our moral duties towards slaves, human embryos, etc., are grounded in their real personhood (which is their human dignity) and not in their legal status. It is because of their real personhood that we must protect the lives of unborn children, no matter what the law says. And it is because of their real personhood that unborn children ought to be legal persons (functionally and/or semantically), no matter what the Courts say. In other words, our moral duties towards unborn children do not depend upon their legal status; quite the other way around, their proper legal status is a deduction from our moral duties towards them as real persons.

I repeat: I am quite sure that Prof. Rice agrees with all I have just said. Therefore, he should know that, even if his claim about Hatch and legal nonpersonhood were true, it would have no bearing whatsoever on our ability to argue that the unborn are real persons and that their lives are inviolably sacred from the moment of fertilization. Yet he recklessly charges that the Amendment would "deprive us of the ability to make this argument." I can't imagine why.

Now look at (8) again:

> "To the extent that one's right to life is subject to legislative discretion, he is a nonperson."

It is clear that this right-to-life which (8) mentions is intended to be something which legislation can grant or take away, expand or contract. Obviously, then, this right-to-life cannot be the child's moral or natural right, which no legislation can alter. Prof. Rice must be speaking of the child's legal right to life. And here we must be very careful.

In one sense, every legal right is a man-made product of government. It is most important not to read Prof. Rice's words in this sense. Otherwise, his (8) would make us all nonpersons. We would even have the absurd consequence that the Human Life Bill, since it is an exercise of Congressional discretion, depersonalizes the very children it deems persons!

No, Prof. Rice is not asserting any such absurdity, because here he does draw the distinction between levels of human law. His (8) means to say just this:

> *If the legislatures have discretion UNDER the Constitution to expand or contract your legal right to life, then you are not a legal person IN the Constitution.*

This is a fairly clear, functional criterion of Constitutional personhood. It is unavoidable that this is what Prof. Rice means by (8), because it is just in this sense that (8) tells against the Hatch Amendment. *Under* that Amendment, the Congress and the state legislatures have concurrent power to expand or contract the legal protection of unborn life; and *therefore*, Prof. Rice wants to conclude, the Amendment makes the unborn nonpersons *in* the Constitution.

So we are finally clear on the meaning of (8), and it should be *getting* clear why the pro-life movement should never -- never -- concede the truth of (8). For to the precise extent that (8) tells against Hatch, it tells in favor of *Roe v. Wade*.

Indeed it does! The historical record is unmistakably clear. In the 1820s the state legislatures first exercized their *discretion* to protect the unborn; from the 1830s to the 1890s, the legislatures expanded that protection; from the turn of the century to the 1960s, they maintained it; in the 1960s they began to contract it; during all that time, no Court ever set requirements on their Constitutional power to expand and contract such protection. In the *effective* meaning of the Constitution, the legislatures undeniably had a discretion; and therefore, if (8) is a sound criterion, the Supreme Court in 1973 had no choice but to declare the unborn nonpersons in the Constitution!

Oh, I know the objection which the reader is forming. You want to ignore the Constitution's effective meaning in those days and say something instead about the *true meaning* of the 14th Amendment, about how it contains an obligation on the states to protect the unborn, so that their "discretion" was apparent rather than real, and about how the Supreme Court ought to have seen this true meaning. You are half right. You can say the first half of this, *given the semantic theory of Constitutional personhood.* But you can't say any of it given Prof. Rice's functional theory. Allow me to prove this.

1. In the semantic theory, everything depends upon the construction of 'person' in certain clauses of the Constitution. Whether or not there was legislative discretion in the past is not decisive for this construction. What is decisive is the true meaning of 'person.' If it turns out that 'person' means

any human being, including unborn children, then such children are eo ipso to be construed as Constitutional persons, and the legislative discretion to which their life was subject in the past, no matter how real, was simply wrong to whatever extent it denied them actual protection.

2. In the functional theory, however, it is impossible to construe 'person' in any clause of the Constitution to refer to those whose right to life is subject to legislative discretion. Where the unborn are concerned, 19th and 20th century Courts and legislatures have taken such discretion for granted. Therefore, one who accepts Prof. Rice's functional criterion has only two options. Either he admits that the legislative discretion was real (in which case he sides with Blackmun in denying the Constitutional personhood of the unborn), or else he tries to prove that, unbeknownst to everybody, the discretion was not real. In order to make that case, he must steal back the basic principle of the semantic theory, use it to secure the "true meaning" of the 14th Amendment, use that meaning to allege that there existed, after the Amendment's ratification, a true but unrecognized obligation upon the states to protect unborn life, and use that unrecognized obligation, finally, to render the prima facie discretion a mere "appearance." Such a case is hopeless; even apart from the initial theft of principle, it overlooks two crucial points.

First, legislative discretion cannot be "merely apparent" unless real discretion has been removed. Since the difference between Constitutional discretion and Constitutional requirement is a legal difference, real discretion is removed only by a legal obligation.

Second, the existence of a legal obligation is its being declared and recognized. An obligation is nothing like a "true meaning," which can exist incognito as an objective relation between words and things, given some standard semantics: a relation of reference or description. An obligation is a relation between agents and actions -- not a relation of reference but a relation of binding. Its to be is its to bind. A moral obligation is able to bind purely objectively, "in the nature of things," and therefore can exist whether judges and legislators acknowledge it or not. But a legal obligation does not exist "in the nature of things." This is the very difference between human law and Moral or Natural Law. Legal obligations have to be created by human, legal authorities. A legal obligation binds in being declared, exists in being recognized, even if it isn't enforced. An unenforced legal obligation is intelligible; but an undeclared, unrecognized legal obligation is a hole without a doughnut: nothing.

Therefore, the real discretion which the state legislatures exercised until 1867 never was removed; no legal obligation ever made their discretion "merely apparent." Ineluctably, therefore, the functional criterion of Constitutional personhood with which Prof. Rice tries to smite the Hatch Amendment turns into a vindication of Roe v. Wade, and Prof. Rice himself becomes the one "propagating" a principle of that iniquitous decision.

So we must reject premise (8). When it goes, the functional theory of personhood goes with it, for lack of a functional criterion. Without these, the Third Inference collapses. Its conclusion (10), that the Hatch Amendment "wholly accepts" the nonpersonhood of the unborn child, is misleading and unfair. Misleading: because there is no truth to it beyond the obvious and trivial fact that Hatch does not do the full job of the NRLC Amendment. Unfair: because the Paramount Amendment doesn't do the full job either and yet is never attacked in this sensationalistic way.

Let us now face a moral question. The NRLC Amendment restores the Constitutional personhood of the unborn in the full semantic sense. Is this approach morally required of us? Is it wrong of the Hatch and Paramount Amendments not to do this? Of course not. The history of how the 14th Amendment has been interpreted makes the restoration of such personhood a minefield, swept by the machine-gunfire of Harriet Pilpel and her allies. It is certainly permissible to avoid this route, if the unborn can be given acceptable protection in another way.

Is the Hatch Amendment a way to give the unborn acceptable protection? It most certainly is. By negating any right to abortion, it makes the unborn child of any age, from fertilization onward, one with whose life a coercive interference is no one's right or liberty. Thereupon, state or federal statutes restricting or prohibiting abortion cease to be "encumbrances" of a woman's right and need no longer meet the test of "compelling interest." Also, under the Hatch language, the state and Congressional measures are not mere enforcements of a Constitutional provision but exercises of a plenary power. For these two reasons, Hatch gives the legislators the fullest and most court-proof authority it is possible to give them -- so much so, that some Constitutional scholars hold the potential for protection under Hatch to be greater than under a number of definitive Amendments.[12]

Finally, the Hatch Amendment, far from "excluding" the personhood of the unborn, clears away the most important obstacle to its restoration. With the demise of a "right to terminate pregnancy," of which Roe v. Wade spoke in exactly those words, it becomes once again an open possibility for the Court to reckon the unborn among 14th Amendment "persons."[13]

So. All three of Prof. Rice's inferences are failures. The amazing charges based upon them are groundless. Does it follow that the Hatch Amendment ought to be supported? No; that is a separate case, which I have made elsewhere. What follows is that the Hatch Amendment ought to stop being attacked as though it were some sort of shameful sell-out. Those who have been making that attack with Prof. Rice's arguments -- but with none of his balance and with precious little of his charity -- ought to shut up.

If the economy does not pick up, the Republicans could lose control of the Senate in 1982. Our chance to pass a significant Human Life measure could be lost for another quarter of a century. Does any pro-life faction want to be responsible for that?

If not, can't we all, Bill supporters and Hatch supporters, agree at least on the following two propositions?

First, the Human Life Bill and the Hatch Amendment are both acceptable as interim measures; which one we should try to pass in the immediate future is a purely practical and tactical question.

Second, it is better that either measure pass than that nothing be done.

Now look: suppose I have not convinced the reader. Suppose you will not accept even these two unity propositions. Will you at least agree not to use your money, your mailing list, your political clout, against those members of Congress who have otherwise acceptable pro-life records and who support either measure? Will you at least abstain from prosecuting a pro-life civil war?

Hard-liners, if you will agree to nothing, make no peace, give no quarter, will you at least hold your fire until we have proved who is right? I have advanced arguments to show that your central case is a house of cards, based not on the authentic first principles of St. Augustine, St. Thomas, and Pius XII, but on home-made principles and careless confusions. Let us take our cases, yours and mine, to an Authority we both acknowledge. Let Bishop

Sullivan and Cardinal Madeiros put the question to the Holy See. Yes or no, is support for the Hatch Amendment consistent with the general norms of Catholic morality and with the Vatican *Declaration* of 1974? Phrase the question as you please, and submit both our cases as supporting documentation. I am absolutely confident of the answer, and I challenge you to make the test, before you act irrevocably to divide us.

Footnotes

[1] When I speak of what the HLB *would* do, I mean what it *provides*, the force of its actual words. What the Bill *will* do is a very different question. The Bill's sponsors and the eminent pro-life lawyers who testified in favor of it agree about what it *would* do, and I base my own remarks on their testimony. But it is up to the Courts to determine what the Bill *will* do.

[2] In fact, the objection can be generalized. Not only the Hatch Amendment but also the Paramount Amendment and the Human Life Bill assert *weak* entailments of the 14th Amendment "properly construed." By a weak entailment, I mean an implication like this: if you have two arms, then you have at least one arm. Just so, if you are a 14th Amendment "person," then you at least have the right to life (Paramount), and you are at least a person in the Due Process Clause (HLB), and no one has the right, at least, to abort you (Hatch), and the states have the power, at least, to protect you (Hatch and HLB). So this objection can be made whenever pro-life forces try to enact a measure which restores to the unborn only a part or an aspect of what the unborn would enjoy as full 14th Amendment "persons."

[3] Nor will a judge in World I be likely to hold that the Hatch Amendment somehow "vindicates" or "confirms" the Supreme Court's exclusion of the unborn from 14th Amendment personhood. The Committee Report on the Hatch Amendment will say that the measure is *not intended* to deny the personhood of the unborn and that Congress finds the Court's reading of the 14th Amendment unpersuasive. (I make this prediction on the basis of conversations with Sen. Hatch's staff on the Constitutional Amendments sub-committee.) A judge must be guided by the record of legislative intent, and the record on the Hatch Amendment will make it perfectly clear that the measure, proposed in the absence of a satisfactory reading of the 14th Amendment, is not intended to exclude the right reading.

[4] Once again, what the Bill *would* do is clear and what it *will* do is conjectural. But perhaps the reader feels that at *this* point my argument turns precisely on what it will do. Perhaps so. It is time to look at the four plausible conjectures or scenarios.

If the Supreme Court contrives to reject the Bill as unconstitutional, the Bill *will do* nothing, obviously. This is scenario I.

If the Court does nothing but accept the Bill at face value, leaving unanswered the fundamental questions of how far the Court sees the action as overthrowing *Roe.v. Wade*'s privacy right, then the Bill will do (at most) what I have said it would do. It will *forbid* the states from taking unborn lives without due process (i.e. from financing or facilitating abortions), and it will *permit* the states to pass criminal statutes punishing abortions done by individuals. This is scenario II.

If the Court not only accepts the Bill but also feels compelled, by the logic of doing so, to reverse itself totally on the meaning of the 14th Amendment, then the Bill will solve the whole abortion crisis at one stroke -- scenario III.

If the Court accepts the Bill and thereby takes the opportunity to pull back only partially from *Roe.v. Wade*, e.g. by holding that the right to life of an entity which is a person solely for purposes of the Due Process clause cannot prevail over the mother's right to privacy when *her* life or health is at stake, then the Bill will give us only a new and more deeply disguised version of abortion-on-demand (that is, given a friendly doctor). This is scenario IV.

My argument that the Hatch Amendment poses no conflict with the Bill, if the latter has been passed first, holds up in scenarios II and IV, trivially also in scenario I. In scenario III, of course, the Bill obviates the need for any Amendment; if a ratification fight for Hatch is underway when scenario III materializes, the effort will stop at once, and no conflict of provisions will ever exist.

[5] Perhaps Prof. Rice does not realize this unfairness because, instead of talking about what the Bill *would* do, if accepted as written, he prefers to predict what the Bill *will* do, and he predicts scenario III or nothing. A scholar may predict whatever he likes; but the only fair way to compare the Constitutional effects of two measures is to look at *what they provide*.

[6] This interpretation is crystal clear ~~from the context; it will be clear~~ to anyone who *finishes* the quotation which Prof. Rice started. For here is how it goes on: "Nor can he take part in a propaganda campaign in favor of such a law, or vote for it. Moreover, he may not collaborate in its application. It is, for instance, inadmissible that doctors or nurses should find themselves obliged to cooperate closely in abortions and have to choose between the law of God and their professional situation."

[7] This idea of two levels and two standards is a natural development of St.Thomas's doctrine on the *teaching* function of the law. He says that human law is only a teacher for those too wicked to be restrained by moral and parental training; in other words, the law *teaches in and through punishing* (Summa Theologiae 1-2, q. 95, a. 1). It follows that the criminal law is the teacher, not the Constitutional law. St. Thomas had no occasion to draw this distinction, since the idea of having a "written Constitution" is a later invention.

[8] St. Augustine taught thus: "The law which is framed for the government of states allows and leaves unpunished many things that are punished by Divine providence. Nor, if this law does not attempt to do everything, is this a reason why it should be blamed for what it does" (*On Free Will*, book V). On this point, St. Thomas fully agrees with the social doctrine of St. Augustine; he quotes this very text with approval in the Summa 1-2, q. 96, a. 2 ad 3. I am indebted to Mr. Richard Doeri nger for bringing this text to my attention, and I commend its wisdom to the deep consideration of all those who are tempted to "blame" the Hatch Amendment precisely for not "attempting to do everything."

[9] The profound reason for this policy is explained by Pius XII. He observes that, if one were to make the highest ideals of Christendom *mandatory* policy for Catholic politicians, one would be giving to human authority "an absolute and universal command" in enforcing matters of faith and morals. "Such a command is unknown," he says, "to the common convictions of mankind, to Christian conscience, to the sources of Revelation and to the practice of the Church. . . . The duty of repressing moral and religious error cannot therefore be an ultimate norm of action. It must be subordinate to higher and more general norms, which in some circumstances permit, and even perhaps seem to indicate as the better policy toleration of error in order to promote a greater good," (Pope Pius XII, *Address to the Fifth National Convention of the Union of Italian Catholic Jurists*, December 6, 1953).

[10] Hear John XXIII: "However, when it comes to reducing these teachings to action, it sometimes happens that even sincere Catholic men have differing views. . . . Let them not, under pretext of seeking what they think best, meanwhile fail to do what they can *and hence should* do" (*Mater et Magistra*, n. 238, emphasis added). In quoting these words, I break a long personal tradition. Never before have I cited the words of this particular Pope with approval. God rest his soul, he was not my cup of tea. But even John XXIII realized that it was mad work to make the perfect the enemy of the good.

[11] Possibly Prof. Rice considers the Paramount Amendment personalizing because he implicitly supplements the semantic theory with a legal rule-of-thumb, according to which you are a person if all your rights are protected; perhaps he reasons that the right to life is the only unprotected right of the unborn, and so concludes that the Paramount Amendment causes the unborn to fit the rule-of-thumb as persons.

I have several reasons to find this possibility unconvincing.

(1) Absent the right to life, the other rights of the unborn are mere relics in the law. In many states their protection may disappear before the Paramount Amendment is ratified, whereupon the Amendment will no longer cause the child to fit the rule of thumb.

(2) Even with the Paramount Amendment in place, no other right of the unborn child would be mentioned or protected in the Constitution. Therefore, the Amendment might make the unborn rule-of-thumb persons in those states in which their other rights are all protected, but it would hardly make them persons in the Constitution itself.

(3) If all courts and all lawyers can see that the Paramount Amendment is personalizing, in a sense equivalent, for all practical purposes, to making the unborn 14th Amendment "persons," then every ambush which Harriet Pilpel has planned for the NRLC approach will work against the Paramount Amendment as well. I have always hoped, at least, that this would not be the case.

[12] Denis J. Horan and Victor G. Rosenblum, The Hatch Amendment: A Legal Analysis (AUL Studies in Law and Medicine, No. 12), pp. 22ff.

[13] Ibid., p. 21.

CONSTITUTIONAL PROTECTION OF UNBORN CHILDREN:

An Examination of the "Hatch Amendment"

Statement of

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February 3, 1982

I.

The Hatch Amendment Proposal and the Representations Made in Support of it by its Proponents

Senator Orrin G. Hatch on September 21, 1981, introduced S.J. Res. 110[1] proposing an amendment to the Constitution of the United States to deal with the problem of abortion on demand created by the Supreme Court's abortion decision of 1973 in Roe v. Wade.[2] Its proponents take the position that its submission by Congress for ratification by the States would be a "major step forward in restoring protection for unborn human life."[3] The purpose of this memorandum is to demonstrate that the "Hatch Amendment," as this resolution has come to be known, contains fundamental flaws which render it unacceptable as even "a first step" toward protecting unborn children from abortion.

The Hatch Amendment provides:

> A right to abortion is not secured by this Constitution. The Congress and the several states shall have concurrent power to restrict and prohibit abortion: Provided, that a provision of a law of a State which is more restrictive than a conflicting provision of a law of Congress shall govern.[4]

The proponents of this proposed amendment have made the following representations, among others, in support of it:

1. It "contains political potential during the current Congress substantially greater than do the more traditional 'Human Life Amendments'. . .to put together the broadest anti-abortion coalition possible. . ."[5] A "(m)ajority of Americans would support it," and "(o)nly the hard core abortion advocate would vote against it [in Congress]."[6]
2. It is a "Human Life Amendment"[7] involving a "new approach" to the abortion controversy.[8]
3. It "would overturn the infamous decision of the U.S. Supreme Court in Roe v. Wade."[9]
4. It resembles the Thirteenth and Fourteenth Amendments. The Fourteenth Amendment "is certainly ample precedent for such a response to a Supreme Court decision" since it "was proposed to the Constitution following the infamous decision of the Supreme Court in the Dred Scott case . . . that black individuals were nonpersons under the Constitution."[10] It is also "modeled on the Thirteenth Amendment in the sense that it applies to abortions as an institution, just as the Thirteenth Amendment applied to slavery as an institution, including all its badges and incidents."[11] "The Thirteenth Amendment . . . simply outlawed slavery itself" and "did not attempt to address

the issue of 'citizenship' . . . The Fourteenth Amendment . . . granted citizenship. The analogies here are obvious. Black Americans needed citizenship . . . just as unborn need to be protected from abortion now by the proposed amendment."[12]

5. It "would restore to the States . . . the authority to legislate with respect to abortion . . . without dictating particular outcomes or policies." It would thus "deconstitutionalize the issue of abortion." As a result the States "could act under the proposed amendment to totally prohibit abortion. But, if they chose, [they] could undertake far less reform. They could, for example, . . . choose only to limit the circumstances [for abortions] of late pregnancies alone . . . [or] require [only] some form of spousal consent to abortion . . ." "(I)f they chose, [the States] could further decide to do nothing about abortion. That, too, would be within their discretion under the proposed amendment." The legislatures are "far better equipped . . . to resolve the enormously difficult problem of abortion."[13]
6. It "will avoid problems of [the] States' Rights Amendment [since it] prevents abortion havens."[14]
7. It "restore(s) the status quo before Roe v. Wade (states' rights) rather than a status quo that never existed (constitutional prohibition on abortion)."[15]
8. "There is no alternative now than a constitutional amendment to overcome . . . [the] constitutional right to abortion" articulated by the Supreme Court as emanating from the Fourteenth Amendment--except to wait for the slim possibility that the Court may someday admit its error and overturn its own abortion cases. "(T)here is not currently the kind of consensus for . . . go(ing) further" than the proposed amendment goes. "Nor is such a consensus imminent."[16]

The Reasons for Opposing the Hatch Amendment: General

Despite the evident and laudable good intentions of the proponents of the Hatch amendment, it is clear that the reasons in its behalf stated by them cannot withstand critical analysis as purported good reasons for support of this proposal by the Right to Life Movement. Moreover, and more importantly, there are additional reasons, not carefully examined by these proponents, which demonstrate clearly that the Hatch Amendment, if adopted, would produce utterly disastrous results relative to the goal of providing protection for the lives of unborn children against abortion. For these reasons, the Right to Life Movement, when it fully understands the baleful significance of the Hatch Amendment, will not support it.

Efforts to obtain submission and ratification of the Hatch Amendment are doomed to failure for much the same reasons that similar efforts relative to the Equal Rights Amendment have failed. This matter of the possibility of developing a genuine consensus in support of a proposed constitutional amendment is critical in judging the merits of resorting to a particular amendment. Amendments to the Constitution are only possible when an overwhelming consensus in support of them exists. Out of over 10,000 amendment proposals submitted in Congress between 1792 and 1982 only 19 have been submitted by it to the States and of these only 16 have been ratified. A widespread consensus in support of the Hatch Amendment is intrinsically impossible for the general reasons previously stated and, as a consequence, it cannot be ratified. Moreover, for the same reasons it should not be supported by members of the Right to Life Movement nor submitted by Congress.

III.

The Hatch Amendment Confirms and Places in the Constitution the Supreme Court's Holding in *Roe* v. *Wade* that the Unborn Child is not a Person within the Meaning of its Provisions Protecting the Right to Life

Let us examine the reasons stated by proponents of the Hatch Amendment to determine whether they constitute a sufficient foundation for supporting its submission by Congress. The proposal is clearly not a "Human Life Amendment" as its proponents assert. It contains no iota of constitutional protection for the lives of unborn children against abortion. Indeed, its principal scholarly proponents concede this point. They could not do otherwise since the members of the Right to Life Movement have long since reached a consensus that a "Human Life Amendment" is one that provides constitutional protection for the lives of unborn children against abortion. Labelling the Hatch Amendment as a "Human Life Amendment" does not make it one from the standpoint of this consensus.

Secondly, the Hatch Amendment does not overturn the infamous decision of the Supreme Court of the United States in *Roe* v. *Wade* with regard to its holding that an unborn child is not a person within the meaning of the Fourteenth Amendment and its protection of the right to life. The proposal does not recognize the personhood of the unborn child. Indeed, the Hatch Amendment makes the holding of the Supreme Court that the unborn child is not a person protected by the Constitution an integral part, a central girder of the Constitution itself. It accomplishes this result not only by failing to overrule that fundamentally evil and legally erroneous holding of the Supreme Court and leaving it wholly intact as an interpretation of the Constitution but also by giving to Congress and to State Legislatures the absolute discretion to provide no protection to unborn children against abortion. The Hatch Amendment can only be described as a grant of the right to the legislative branch of the federal and state governments to treat the unborn child as a thing rather than a person, a chattel rather than a human being, a slave rather than a freeman. The Hatch Amendment thus accepts the holding of the Supreme Court that the unborn child is not a constitutionally protected person with respect to its life by not overruling it and by affirmatively inserting that holding into the Constitution through the vehicle of this grant of authority to treat the unborn child as a non-person. Currently, this holding of the Supreme Court, effective as it is in producing the abortion holocaust involving

1,500,000 deaths of unborn children annually, is nevertheless but an interpretation of the Constitution, and not the Constitution. The Hatch Amendment makes that interpretation a formal, written part of the Constitution itself. This view of the Hatch Amendment proposal is shared by Professor Robert Byrn of Fordham University Law School, Professor Charles Rice of Notre Dame Law School, and myself. Together we have participated for many years in the formulation of proposed constitutional amendments and legislation to deal with the Roe v. Wade decision. Most recently, we prepared the proposal that was adopted by the National Right to Life Committee, with some modication, as the "Unity" Human Life Amendment. Many other legal scholars agree with our interpretation of the Hatch Amendment in the respect just elaborated. Moreover, no legal scholar who has testified in support of the Hatch Amendment has developed a cogent argument to the contrary of this interpretation of it.

IV.

The Hatch Amendment is a Radical Departure from the Principles of Justice of the Thirteenth and Fourteenth Amendments

What has just been stated concerning the central operation of the Hatch Amendment proposal enables us to discern the fallacy of the argument made by its proponents that the amendment resembles the Thirteenth and Fourteenth Amendments. A much fairer statement would be that it is the very antithesis of these earlier amendments. Moreover, the statements by the Hatch Amendment proponents concerning these amendments reveals a singular misapprehension of the purposes of their framers and the relationship between them as perceived by their framers.

Both the Thirteenth and Fourteenth Amendments established protection for fundamental human rights to life, liberty, and property. The Thirteenth Amendment accomplished this through its Section 1 which has been interpreted by the Supreme Court not only to have abolished the institution of slavery and involuntary servitude but also to have recognized and implemented the right to freedom to exercise the basic human rights to life, liberty, and property and to receive equal protection of the laws. This was clearly the purpose of its principal proponents. The Fourteenth Amendment was submitted for ratification several months after the ratification of the Thirteenth Amendment. Its Section 1 containing the definition of citizenship, the Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause was generally understood by its proponents to be a reconsummation of the Thirteenth Amendment, a more specific spelling out of what was already contained in or the effect of what was contained in the earlier amendment. Section 1 of the Fourteenth Amendment was designed to eliminate all doubt concerning what had been accomplished by the ratification of the Thirteenth Amendment.

Both of these amendments granted authority to Congress to enforce, by appropriate legislation, the substantive provisions of the particular amendment. Moreover, it was generally recognized by their framers that the States had authority and, indeed, were under a duty to enforce these provisions. But this specific grant of authority to Congress and the recognition of state legislative authority had reference to the main reason for these amendments: the substantive provisions recognizing and implementing the fundamental human rights of persons. These substantive provisions not only provided the guidelines for what Congress and the States were to do by way of implementing the amendments by legislation but also provided the limitations that were always to be observed. These substantive provisions were designed to protect as persons all human beings, of all ages and conditions, and their right to freedom to exercise the basic human rights to life, liberty, and property. Congress and the States could no longer decide who is and who is not a person and thus who is entitled to protection of the right to life. These decisions had been made by the framers of these amendments and when ratified these amendments established substantive law beyond the power of the Congress, the Executive Branch, the Supreme Court, or any organ of State or local government to change. The Hatch Amendment, by way of unfortunate comparison, clearly is a radical departure from the model of the Thirteenth and Fourteenth Amendments. It allows the legislative branch of the federal and state governments, as Senator Hatch explicitly recognizes, to decide whether it will provide or refuse to provide protection for the lives of unborn children against abortion. It does not provide, as do the Thirteenth and Fourteenth Amendments, any substantive rules of law protecting all human beings as persons, including unborn children, in the enjoyment of the right to life. Rather, it grants an absolute discretion to Congress and the States to determine whether this protection is to be given or refused.

V.

The Hatch Amendment Will Destroy the Constitutional Basis Presently Available for Persuading the Court to Overrule, as Erroneous, Its Holding in *Roe* v. *Wade* that the Unborn Child is not a Person Protected by the Constitution Against Destruction of its Life by Abortion

Numerous legal scholars have taken the position that the Supreme Court erred in interpreting the Constitution as it did in *Roe* v. *Wade* as a basis for invalidating the Texas anti-abortion statute involved in that case. Many of these scholars rest their position upon the contention that, properly interpreted, the Constitution protects the unborn child as a person, like other human beings, with respect to the right to life. Some base their analysis upon the Fourteenth Amendment's use of the term "person." Others invoke the Thirteenth Amendment. Still others, such as myself, contend that both of these amendments, as well as the Fifth Amendment, apply to all human beings, including unborn children, as persons. The legal writing of these scholars in this regard will be invaluable in moving the Supreme Court to reexamine the propriety of its decision in Roe v. Wade when and if Congress enacts legislation, such as one or more versions of a Human Life Statute that have recently been considered by the Senate Subcommittee on Separation of Powers. Legislation of this sort is designed to produce a confrontation between the Supreme Court and the Congress and to persuade the Court to reexamine and overrule its decision and holdings in that case.

The Supreme Court regularly reconsiders the propriety of prior decisions it has made. Indeed, the Court has far more frequently overruled its prior decisions than there have been amendments made to the Constitution. As compared with only 16 amendments made to the Constitution since 1792, the Supreme Court has rendered 143 decisions overruling 196 prior decisions between 1808 and 1972. Moreover, in the twenty year period between 1959 and 1979, the Court rendered 47 decisions overruling prior decisions. These were decisions that explicitly overruled such prior decisions. If the decisions were added to these in which the Court made substantial modifications in or impliedly overruled prior decisions, we would have to increase the number of overruled decisions during the past twenty years several-fold beyond the 47 previously mentioned. There are numerous reasons that the reconsideration and overruling process takes place more and more frequently since 1930. Not the least of these is the fact that the Court has undertaken an increasingly larger role in overseeing or monitoring the validity of state and federal action. In this process it has made numerous errors in analysis and has found it necessary to correct them by overruling prior decisions.

It is extremely important in seeking to implement the goal of protecting the lives of unborn children from abortion to keep open the avenue of accomplishing this through litigation, aided by Congressional legislation, designed to cause the Supreme Court to reconsider and overrule its decision in Roe v. Wade. What impact would adoption of the Hatch Amendment have upon the availability of this avenue? It is quite clear that the amendment would close off this avenue. Previously, the point has been made that the Hatch Amendment effectively inserts into the Constitution the Supreme Court's holding in Roe v. Wade that the unborn child is not a person protected by the Constitution. It makes constitutional federal or state legislation that provides no protection for the lives of unborn children against abortion or provides protection that is inconsistent with their being persons. In this situation the Court would be precluded from holding this legislation to be unconstitutional upon the ground that its holding in Roe v. Wade was erroneous. That erroneous holding, by virtue of the ratification of the Hatch Amendment, would have become an integral part of the Constitution. Although the Court might conclude that holding to be wrong, it must now respect the Hatch Amendment which makes it an explicit constitutional provision.

VI.

The Hatch Amendment Will Substantially Increase the Barriers to Obtaining Submission and Ratification of a Human Life Amendment

The proponents of the Hatch Amendment recognize that the measure falls well short of securing the goal of the Right to Life Movement relative to providing constitutional protection for the lifes of unborn children. They attempt to justify the measure in terms of the asserted new legislative power to prohibit abortion. We have already examined some of the immediate losses that adoption of the measure entails relative to protection of the lives of unborn children. Beyond these losses is the question of whether the Hatch Amendment, if submitted and ratified, will substantially increase the barriers to obtaining submission and ratification of a Human Life Amendment. It is clear that its ratification will substantially increase those barriers.

Its proponents rightly observe that the law is a teacher. They contend that the longer that the *Roe* v. *Wade* decision stands unreversed the longer it will operate to cause Americans to judge that it represents what is good or appropriate as conduct to engage in. But decisional law is not the only kind of law that is a teacher. The proposition urged by Hatch Amendment proponents also applies to any form of law and most especially to constitutional provisions. The clear teaching of the Hatch Amendment is that it is alright for Congress or a State Legislature to refuse to provide protection for the lives of unborn children against abortion and to view them as nonpersons or chattels.

Americans have already had a terrible lesson concerning the placement in the Constitution of provisions recognizing the existence of a morally evil social institution and aiding its enforcement. The Constitutional Fathers in order to insure the ratification of the Constitution by some of the States inserted within it the Fugitive Slave Clause, and the Apportionment Clause which directed that in the apportionment of representatives among the several states a nonfree or slave person should count as three-fifths of a person. The framers of our Constitution carefully avoided the use of the term "slave" in expressing these recognitions and aids to the institution of slavery. Nevertheless, it was clear to all what had been done by way of compromise to secure ratification of the Constitution. As a result of the inclusion of these clauses in the Constitution, the supporters of the institution of slavery successfully pointed to their presence in the Constitution as a basis for opposing all efforts to prevent the extension of slavery to the territories and for imposing onerous burdens upon the free states relative to permitting the pursuit, capture, and return of slaves to their slave masters. Indeed, it was regularly argued that the Constitution because of its recognition of and aid to the institution of slavery prevented the people of the United States from amending the Constitution so as to outlaw slavery. Indeed, in 1864 after more than three years of Civil War, the United States House of Representatives failed to secure the necessary two-thirds vote to adopt the resolution for submitting the Thirteenth Amendment for ratification. The argument that the Constitution recognized and aided the institution of slavery was one of the principal arguments relied upon by opponents of this resolution.

So too the opponents of a Human Life Amendment will rely upon the ratified Hatch Amendment as the basis for their argument that the unborn child is a nonperson and that it has no constitutional right to the protection of its life against abortion. That argument will clearly be correct and it will persuade many that a Human Life Amendment should be rejected. It will persuade them upon the basis that what has been done in the past by way of adding to our fundamental law must be justifiable action at least to the extent of warranting its continuance unless a strong demonstration is made that the addition was wrong. It thus will be far more difficult to seek a Human Life Amendment to reverse the Hatch Amendment than to reverse the single Supreme Court decision in Roe v. Wade which is not the Constitution but a demonstrably wrong interpretation of that document.

VII.

The Hatch Amendment Will Operate to Create Abortion Havens

We have already seen that the Hatch Amendment grants the absolute discretion to Congress and to the States to deny unborn children protection of their lives from abortion. Even if legislation could be secured from Congress or from each of the States to protect the lives of unborn children from abortion, there is no security that this legislation will remain in place and intact. Each session of Congress and of each of the State legislatures will become a new battleground over abortion versus the protection of unborn children. If the medical profession, the pharmaceutical houses, the abortion clinics, and other supporters of abortion pour enough millions of the dollars they have earned in the abortion industry into their interest group campaign for legislation authorizing abortion, it is likely that they will succeed in some states at different periods of time. The rather penurious pro-life forces will have to keep ever ready to fight new battles in Congress and the State legislatures to retain the hard-won statutory protections for the lives of unborn children, assuming, as we have, that the protection is once secured.

Inevitably, as judged by the track records of many States, the abortion industry interest group will succeed in persuading their State Legislatures to permit abortion on demand. This success is likely to be obtained in such States as Texas, New York, Massachusetts, California, and Hawaii as well as the District of Columbia where this interest has long since demonstrated its political muscle. Undoubtedly with such backup funds as the $500,000,000 annually earned by the nation's abortion mills, according to the estimates of Dr. Bernard Nathanson, the success of this interest group will be extended to other States. The Hatch Amendment will be implemented primarily by State legislation. That is the current view of those, such as Congressman Henry Hyde and Senator Jesse Helms, who have proposed a federal Human Life Statute. This view is widely shared by their colleagues. Historically also, the federal government has only regulated abortion in federal enclaves, the District of Columbia, federal territories, and other places or subjects within the exclusive or primary jurisdiction of Congress. It is, therefore, highly improbable that the Hatch Amendment will be implemented primarily by federal legislation rather than State legislation. This means, however, that our abortion law will be fragmented and uneven in its protection of unborn children. As previously pointed out, the Hatch Amendment establishes no standard for State legislatures to follow in legislating with respect to abortion other than to tell them that unborn children are not persons within the meaning of the Constitution. State legislatures are likely to create abortion legislation which will vary all the way from vigorous anti-abortion statutes to statutes which permit abortion on demand and which fund such abortions. There will be some States which will become abortion havens in which the entire abortion industry continues to operate in full force while selling its services and products to pregnant women who come from other States having stiff anti-abortion laws as well as women located in these abortion haven states.

NOTES

1. Congressional Record, Vol. 127, No. 131 (September 21, 1981) S10191.

2. 410 U.S. 113 (1973).

3. Markman, Stephen, Esq. (General Counsel, Senate Judiciary Constitution Subcommittee) "Political Assessment of the Proposed Amendment" (Confidential Memorandum, 1981) 5.

4. Congressional Record, op. cit., 1.

5. Markman, op. cit., 2.

6. NCHLA newsletter (September 21, 1981).

7. Congressional Record, op. cit., S10194 (Statement by Senator Hatch).

8. Markman, op. cit., 2.

9. Congressional Record, op. cit., Id. at S10195.

10. Id. at S10195.

11. Rosenblum, Professor Victor G., "The Hatch Amendment: A Legal Analysis," AUL Studies in Law and Medicine, No. 12 (1981) 15.

12. O'Steen, Dr. David N., "The Case for a New Pro-Life Strategy--Two Amendments," (Confidential Memorandum, 1981) 9-10.

13. Congressional Record, op. cit., S10195-97.

14. NCHLA newsletter, op. cit. 1.

15. Markman, op. cit. 1.

16. Congressional Record, op. cit.

NATIONAL CONFERENCE OF CATHOLIC BISHOPS
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December 8, 1981

MEMORANDUM

TO: Most Rev. Thomas C. Kelly,
General Secretary

FROM: Wilfred R. Caron,
General Counsel

RE: Human Life Federalism Amendment (S.J. Res. 110)

This memorandum presents my legal assessment of the Human Life Federalism Amendment (S.J. Res. 110), with a due consideration of the principal questions posed by others who are dedicated to the protection of the unborn. In recognition of its precise objective, I shall refer to the proposal as the "Life Amendment."

INTRODUCTION

The Life Amendment provides:

> "A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortion: Provided, That a law of a State which is more restrictive than a law of Congress shall govern."

It is at once evident that this new initiative to protect the unborn employs conceptually new means in pursuit of the traditional goal of the pro-life movement. Although we must examine it with prudent circumspection, it is essential that the analytical process be one of reasoned objectivity predicated upon certain fundamental guiding principles. In addition to the first principle of providing maximum protection for the unborn, there are three that should be mentioned at the outset.

Norms for Interpretive Analysis

The language of the Life Amendment must be assessed by those rules of interpretation which have been established by the judiciary for its own governance and the guidance of the bar. However justified or profound may be our disappointment with the results in cases like Roe v. Wade,[1] it cannot alter the need to rely upon those norms. In the end, if we do not have them for guidance we have none.

Statutory and constitutional provisions are a medium by which society communicates its will to its members.[2] As with any form of language, the potential for imprecision can affect the communication intended.[3] It is not possible to word a provision of law so perfectly that it cannot, by a process of hypercritical philological analysis, be construed at variance with what was originally intended.[4] Cognizant of these limitations of language, the courts have traditionally endeavored to interpret constitutional provisions so as to effectuate, rather than defeat, their underlying purposes.[5] The courts will look to the historical setting in which a constitutional provision was adopted to reveal the purpose of its framers and "search for admissible meanings of its words which, in the circumstances of their application, will effectuate those purposes."[6] A corollary is this: "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition."[7]

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[1] 410 U.S. 113 (1973).

[2] 2A Sutherland, Statutes and Statutory Construction 1-2 (4th ed. 1973).

[3] Id.; see also the Federalist No. 37 (J. Madison) 229 (New American Library ed. 1961).

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[4] Martin v. Hunter's Lessee, 14 U.S. 304, 374 (1816) (Johnson, J., concurring).

[5] United States v. Classic, 313 U.S. 299, 316 (1941); see also Legal Tender Cases, 79 U.S. 382, 531-32 (1870); Prigg v. Pennsylvania, 41 U.S. 539, 612 (1842) ("No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.").

[6] United States v. Classic, 313 U.S. at 317-18.

[7] United States v. Sprague, 282 U.S. 716, 731 (1931). See also, Lake County v. Rollins, 130 U.S. 662, 671 (1889) ("The simplest and most obvious interpretation of a Constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption."); United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 539 (1944) ("Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written.").

Thus, in assessing the likely interpretation of the Life Amendment, it should be borne in mind that the court will not look merely to particular words, but primarily to the manifest purpose of the amendment as evidenced by its historical context and the common understanding of what it is supposed to accomplish. It cannot be assumed that an antagonistic court will subvert the intended effect of the Life Amendment through arbitrary or unreasonable interpretation.

Objectivity and Resilience

Until now, proposals to protect the unborn have been substantially locked in combat with the holding of *Roe* v. *Wade* that the unborn are not "persons" within the meaning of the Fourteenth Amendment. Outraged, the pro-life movement has vigorously labored to reverse this unacceptable concept and achieve explicit legal recognition of the unborn as "persons". Hence, we come to a consideration of the Life Amendment after more than eight years of work with a different concept. It is critical that preconceptions not impair our objective consideration of the merits of this innovative new pro-life measure. It must be assessed in terms of its potential for protecting the unborn. We must judge it by its necessary and probable effects only; any other test would exalt form over substance and suggest a lack of resilience which can obfuscate truth.

Natural Law and Human Law

The assessment of the Life Amendment calls into consideration the relationship of positive human law to the natural law or moral order. On this profound level, the issue is jurisprudential and theological. It is natural for persons with a deep moral commitment to yearn for the convergence of the moral order and laws promulgated by society. However, as St. Thomas Aquinas taught, the proper office of human law is to serve the common good of society; that function is not coextensive with that of moral law.[8] In service to the common good, human positive law must take into account all relevant factors, not only the moral ideal.[9] This dynamic is particularly complex in a democratic and pluralistic society. The application of the relevant theological principles to the present situation presents complex and profound questions, for which a well-grounded response depends upon specialized theological knowledge. The Bishops have addressed this issue and provided leadership. My purpose is not to attempt the requisite analysis, but solely to emphasize that a complete legal analysis transcends a consideration of the legal effect of the Life Amendment.

ROE v. WADE

Analysis of the Life Amendment requires consideration first of the relevant holdings in Roe v. Wade.

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[8] Summa Theologiae I-2, q. 96, a.1.

[9] Id., a.3.

The Court in Roe observed (410 U.S. at 152) that the constitutional right of privacy had been developing since 1891. In modern times the Court has progressively extended this right, which it grounds in the Fourteenth Amendment's concept of personal liberty, to freedom of personal choice in matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. This right of privacy, the Court held in Roe v. Wade, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." (Id., at 153).

Whether denominated a "right to abortion," or a "right of a woman to terminate her pregnancy," this new "right"[10] enunciated in Roe v. Wade was described as qualified, rather than absolute, thereby allowing some state regulation. The Court held that in pursuance of its interests in safeguarding the health of pregnant women, maintaining medical standards, and eventually protecting "potential" life, the state may regulate the factors that govern the abortion decision but only at the points and to the extent that these interests become "sufficiently compelling." (Id., at 153-54, 163-64).

In the Court's view, the state's interest in protecting the health of the mother becomes "compelling" at approximately the end of the first trimester because, before that point, the incidence of mortality of pregnant women caused by abortion may be less frequent than in normal childbirth. (410 U.S. at 163.) However, even at that point, the state's power to protect maternal health extends only to regulation of the medical aspects of such procedures (such as licensure and qualifications of persons performing abortions, and requirements respecting facilities where it is performed) (id.).

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[10] The term "right" as used here is not to be understood in the same sense in which that term is used in denominating natural rights, those "which grow out of the nature of man and depend on personality, as distinguished from such as are created by law and depend upon civilized society." Black's Law Dictionary 1190 (5th ed. 1979). Rather, it should be understood in the positive law sense as the "power of free action." Id., at 1189.

Under Roe v. Wade, the state's interest in protecting the life of the unborn does not become compelling until viability (the point at which the fetus is capable of living outside the womb--usually after the commencement of the third trimester, according to the Court). At that point the state may, if it chooses, restrict and prohibit abortion except where it is necessary, in appropriate medical judgment, to preserve "the life or health" of the pregnant woman (id.). Lest this power appear overly significant, it must be stressed that in the companion case of Doe v. Bolton the Court viewed the mother's health as encompassing "all factors--physical, emotional, psychological, and the woman's age--relevant to well-being."[11]

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[11] 410 U.S. 179, 192 (1973).

If the Roe v. Wade right to abortion is not de facto absolute, it falls short but slightly.[12]

The Court declined to predicate its qualification of the mother's right to an abortion upon the personhood of the unborn within the meaning of the Fourteenth Amendment, or upon a separate theory that human life commences before birth. Regarding the former, after reviewing the uses of the word "person" in the Constitution, as well as observing that in the 19th century prevailing legal abortion practices were far freer than they were in 1973, the Court concluded that the word "person," as used in the Fourteenth Amendment, does not include the unborn. 410 U.S. at 159. Regarding the latter, the Court noted the wide divergence of medical, philosophical and theological opinion, and denied the judiciary's competence to settle the issue. Further, it rejected the notion that "by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake." Id., at 162.

In terms of its practical effects, if not precisely in its rationale, Roe v. Wade has enshrined abortion on demand as a constitutionally protected right. It has privatized the matter of the life and death of the unborn and almost altogether deprived society of its right to judge its welfare in this fundamental aspect of life. The root of this result is the Court's holding that a right to abortion is encompassed by the right of privacy. The Court's rulings on the matter of the personhood of the unborn and the commencement of human life served only to diminish the regulatory power of the state. Had those rulings been otherwise, the life and welfare of the mother would nevertheless have been pitted against that of the unborn in a "due process" struggle with the outcome an open question at this time. There would have been placed in "due process" opposition the rights of one "person" against another "person", with an ensuing balance of interests that would inevitably require the choice of only one.

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[12] It has been observed: "That definition and the health exception effectively negated the state's power to protect life in the womb after viability. There is not, I should suppose, a single abortion performed that cannot claim justification in terms of the emotional and psychological well-being of the person requesting the abortion." Testimony of Prof. John T. Noonan, Jr. before the Subcommittee on the Constitution, Senate Committee on the Judiciary, October 5, 1981, p. 5 (hereinafter "Senate Subcommittee on the Constitution").

THE LIFE AMENDMENT

Roe v. Wade pressed the Constitution into the service of the termination of unborn human life. The Life Amendment will eliminate that condition and place the Constitution in service to the lives of the unborn. Upon its ratification, every state and the United States will be able to deal effectively with abortion, according to the will of the people, free of the constraint of a constitutional "right" which places almost no value on unborn life. It is, truly, a pro-life amendment.

The Life Amendment is straightforward and powerful, yet possessed of a simplicity which is essential to a proper constitutional statement. It has three components, namely,

1. The absolute and unqualified denial of the Constitution as securing or protecting any right to abortion;
2. The grant of concurrent plenary power to the Congress, as well as the states, to restrict or altogether prohibit abortions; and
3. A proviso which seeks to give supremacy to the more restrictive law in cases where both the Congress and a state exercise their power.

The analysis that follows is organized according to these components.

"A Right to Abortion Is Not Secured By This Constitution."

This sentence is an effective piece of necessary constitutional surgery. Because Roe v. Wade engrafted a "right" to abortion onto the Constitution, it is essential to expunge that right not only as it springs from the rationale of Roe v. Wade, but absolutely. Importantly, this provision is not tied to due process clauses, or to any other constitutional provision, in its abrogation of constitutional protection for a right of abortion. By virtue of this purposeful lack of specificity, it removes the possibility for grounding a right of abortion in any provision of the Constitution.[13] To say that this amendment would overturn Roe v. Wade's holding that there is a constitutionally protected right of abortion, is to identify only one aspect of its broad ameliorative thrust.

"Right to Abortion." Some have suggested there is a flaw in the phrase "right to abortion" upon the ground that Roe v. Wade spoke of a "right of privacy" which encompasses the decision whether to terminate pregnancy. The point is not well taken. The phrase right to abortion is currently used and understood in constitutional law as referring to the right of privacy found in Roe v. Wade. Indeed, one respected authority reports: "This same language, or similar language (i.e., 'right to an abortion,' or 'right of abortion') has been used in 84 federal court decisions since Roe v. Wade and Doe v. Bolton were decided. The phrase 'right to abortion' is used as shorthand for the constitutional right created in Roe and its progeny...."[14]

Clearly, the interpretive norms mentioned earlier would preclude any misunderstanding of the meaning of "right to abortion." The purpose of this amendment to overrule Roe v.

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[13] When he introduced the Life Amendment, Senator Orrin Hatch stated that "it should be explicit that there is no constitutionally based right to abortion emanating from any provision of the Constitution that might potentially restrict the ability of Congress or the States to legislate with respect to the subject." (Emphasis added.) 127 Cong. Rec. S10197 (daily ed. September 21, 1981) (remarks of Sen. Hatch).

[14] Statement of Prof. Lynn D. Wardle before the Senate Subcommittee on the Constitution, November 12, 1981, pages 15-16.

Wade is so manifest that it will be indisputable. Further, to employ Roe v. Wade terminology which relates to "due process" would only narrow the reach of the provision which, as noted, would excise a claim of right from the entire Constitution. Finally, if there remained any doubt of the meaning of "right to abortion," it would be conclusively dispelled by the grant of unqualified, plenary authority to the Congress and the states to prohibit abortions. That grant is entirely inconsistent with a residual constitutional right of choice in the mother which would operate to restrain the exercise of that authority.

"Abortion". The term "abortion" must be considered from the standpoint of the subject matter which it encompasses. What constitutes an abortion? The term has been commonly used in state statutes restricting or prohibiting abortions. Indeed, it is the term utilized in the Texas statute which the Supreme Court dealt with in Roe v. Wade, where the Court used the word "abortion" synonymously with the phrase "termination of pregnancy."[15] Modern medical practice regards the commencement of pregnancy as the time of the implantation of the fertilized egg in the uterine wall.[16] Clearly, abortion would include the intentional termination of unborn life from at least the time of implantation. This was assumed in Roe v. Wade.

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[15] 410 U.S. at 153-54. See also J. Noonan, A Private Choice 150 (1970).

[16] See American College of Obstetricians and Gynecologists, Obstetric-Gynecologic Terminology 327 (def. of pregnancy) and 299 (def. of conception) (1972).

Because of some early judicial precedents, it has been suggested that the term "abortion" may be too readily subject to a narrow interpretation which would partially defeat the Life Amendment's purposes. However, careful analysis reveals that such a concern is not well founded. Although at early common law the term "abortion" was sometimes used to refer to the expulsion of the fetus before quickening or viability,[17] many courts employed the term to refer to the intentional termination of pregnancy at any time between conception and normal birth.[18] While both usages were recognized by legal lexicographers even into fairly modern times,[19] with the advent of criminal abortion statutes in the United States in the 19th Century, this terminological distinction was effectively abolished, first by the state legislatures and then by the courts. In effect, when the term "abortion" was used it was done without regard to whether the act took place before or after quickening.[20] This modern, expanded definition of the term "abortion" is reflected in the existing statutory law of the states. A sampling of such statutes shows that the term "abortion", when it is used in the statutes, has come to apply to the termination of pregnancy at any stage, regardless of quickening or viability.[21] This expanded, current use of the term is, as already noted, reflected in Roe v. Wade.

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[17] Smith v. State, 33 Me. 48, 59 (1851). The term was sometimes refined even further to refer to expulsion during the period between the sixth week after conception and quickening of the fetus. Id. This terminology relates to the fact that at common law, in most jurisdictions, the commission of an abortion was not a crime unless the fetus had quickened. Commonwealth v. Parker, 50 Mass. (9 Metcalf) 263, 43 Am. Dec. 396 (1845).

[18] See, e.g., Mitchell v. Commonwealth, 78 Ky. 204, 39 Am. Rep. 227 (1879); State v. Cooper, 22 N.J. Law 52, 51 Am. Dec. 248 (1849).

[19] See 1 Bouvier's Law Dict. 88 (8th ed. 1914); Black's Law Dict. 20 (Rev. 4th ed. 1968); Ballentine's Law Dict. 4 (3rd ed. 1969); but see Black's Law Dict. 7 (5th ed. 1979) (where "abortion" is defined simply as "The knowing destruction of the life of an unborn child or the intentional expulsion or removal of an unborn child from the womb other than for the principal purpose of producing a live birth or removing a dead fetus.").

If doubt remained, one would only have to consider the absurd result if the term abortion were limited to the period before viability. There would continue a Roe v. Wade right to abortion after viability but not before, thus suggesting a policy which would reduce the protection of unborn life as fetal development advances. This is contrary to common sense, Roe v. Wade, and the policy of the pre-Roe v. Wade law which imposed more severe criminal sanctions for the destruction of fetal life after viability.[22] To the interpretive norms mentioned earlier may be added the principle that courts will avoid constructions which produce absurd, unjust or unreasonable results.[23]

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[20] See People v. Phelps, 61 Hun 115, 15 N.Y.S. 440, 441 (3rd Dept. 1891); Hall v. People, 119 Colo. 141, 143, 201 P.2d 382 (1948); State v. Alcorn, 7 Idaho 599, 606, 97 Am. St. Rep. 252 (1901); State v. Reed, 45 Ark. 333 (1885); State v. Slagle, 83 N.C. 630 (1880).

[21] See, e.g., Cal. Penal Code §274 (West Supp. 1981); Ga. Code Ann. §26-1201 (1978); Ill. Ann. Stat. ch. 38, §81-22(6) (Smith-Hurd Supp. 1980); Ind. Code Ann. §35-1-58.5-1 [10-107] (Burns 1979); Mich. Comp. Laws Ann. §750.14 (1968); Miss. Code Ann.§97-3-3 (1972); N.Y. Penal Law §125.05(2) (McKinney 1975); Ohio Rev. Code Ann. §2919.11 (Page 1975); Okla. Stat. Ann. tit. 21, §861 (West Supp. 1980); Tenn. Code Ann. §39-301 (1975).

In the last analysis, the meaning of the term "abortion" (like every other), as used in the Life Amendment, will be determined according to its intended sense.[24] For those who require even more certainty, the solution is definitive "legislative" history.

Personhood. Some have suggested that the Life Amendment involves a compromise of principle because it does not explicitly identify the unborn as persons. That is not the case. The Life Amendment will empower the Congress and the several states to provide the fullest possible protection to the unborn. It contemplates the protection which attaches to personhood at least just as surely as if the term "person" was employed.

The Life Amendment declines to make rights dependent upon a category or classification, and goes directly to protection. When rights depend on the category of personhood, as they would in a due process formulation, the rights of all persons in the category may be adjusted according to a judicial sense of human values, which could readily develop into subclasses for purposes of abortion. As noted earlier, recognition of the "personhood" of the unborn under the Fourteenth Amendment would have meant only that the unborn, like the mother, would be protected against deprivation of life without due process. The Fourteenth Amendment does not protect life absolutely, as is readily demonstrated by the sanction of the death penalty, but only assures it will not be taken without that process which the courts consider "due". Our experience with Roe v. Wade and its progeny should lead us to other more reliable avenues of protection for the unborn. The Life Amendment is such an avenue.

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[22] See supra note 17, at 13.

[23] United States v. Wainer, 49 F. 2d 789, 791 (W.D.Pa. 1931); Schaeffer v. Thomson, 240 F. Supp. 247, 252 (D.Wyo. 1964); see also In re Chapman, 166 U.S. 661 (statutory provision construed).

[24] United States v. Classic, 313 U.S. at 317-18.

Not only does the Life Amendment empower the Congress and the several states to accord full protection to the unborn, but it calls into serious question and perhaps negates the Roe v. Wade denial of personhood for the unborn. I say this not so much because of an interdependence of that holding and the right of privacy holding, but because the Life Amendment clearly and firmly negates the primacy of the mother in the conflict of rights between mother and unborn child. Indeed, it resolves the conflict for constitutional purposes and fosters the primacy of the child in all circumstances. If the Life Amendment is ratified, how the Supreme Court would rule on the "personhood" of the unborn for other purposes is, at least, an open question. The Life Amendment provides new recognition of the unborn, a major "personhood" development. It seems wrong to fault the Life Amendment as compromising principle, and it seems even more wrong to suggest, as some have, that it ratifies Roe v. Wade's denial of personhood to the unborn.

Ancillary Effects. It is difficult to assess the ancillary effects of the Life Amendment. One respected pro-life leader[25] points out, convincingly, that the abrogation of the right to abortion will effectively nullify those cases whose holdings relied upon the predicate of a right to abortion.[26] By way of illustration, he refers to the spousal and parental consent cases.[27] I agree that the excision of the right to abortion will seriously undermine the holdings of such cases.

"The Congress and the several States shall have the concurrent power to restrict and prohibit abortions"

In addition to denying all constitutional status to any right of abortion, the Life Amendment would confer upon the federal government (in addition to the states) a new power, "the concurrent power to restrict and prohibit abortions."

Traditionally, and by virtue of our federal system under which the national government is one of limited, delegated powers, the states have been the guardians of the health, welfare and safety of people. This reserved power of the states, for which the Tenth Amendment provides, is referred to under the rubric of the police power. By conferring concurrent power on the federal government, and reestablishing the power of the states, the Life Amendment would depart from this traditional division of powers. However, precedents are not lacking. For example, the Eighteenth Amendment gave Congress and the states concurrent power to enforce the prohibition of the manufacture, sale or transportation of intoxicating liquors for beverage purposes. Thus, on matters of important national policy, both levels of government may be called upon to effectuate such goals.

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[25] Prof. Victor G. Rosenblum, Vice-Chairman, Americans United for Life Legal Defense Fund.

[26] Testimony before the Senate Subcommittee on the Constitution, November 16, 1881, pages 6-7.

[27] Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird II, 443 U.S. 622 (1979).

The Life Amendment does not, by its own terms, prohibit or declare restrictions on abortions. As a matter of national policy, it expunges any claim of constitutional right to abortion and, subject to other constitutional limitations (discussed below), grants Congress and the several states complete discretionary power to restrict and prohibit abortions. Each is empowered to formulate and enforce its policy, according to the will of the people whom the legislators represent. Such a grant necessarily allows the possibility that abortion may not be prohibited in particular circumstances. Yet, as a matter of national policy, the Life Amendment is an unmistakable and decisive declaration for the protection of the unborn.

As noted above, because the Life Amendment is directed against abortion only, and against any claim of right thereto under the Constitution, legislation thereunder will be subject to other constitutional guarantees involving, for example, the due process and equal protection clauses of the Fourteenth Amendment. Illustrative of the former would be the application of the so-called "due process" right of privacy to the use of contraceptives by married couples.[28] However, any earlier provision of the Constitution which might conflict with the Life Amendment, and legislation thereunder, would be deemed limited to that extent; the policy and provisions of the Life Amendment would be controlling.[29] No provision of the Constitution could be invoked to dilute the plenary power granted by the Life Amendment to prohibit abortions.

With power granted to both the federal and state governments, a question immediately arises concerning the reconciliation of the exercise of the power by two sovereigns in a different manner. Although the question requires consideration of the grant of the power itself, more particularly the grant of "concurrent" power, it should be discussed in the context of the final component of the amendment, namely, the proviso.

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[28] Griswold v. Connecticut, 381 U.S. 479 (1965).

[29] See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); State Board v. Young's Market Co., 299 U.S. 59, 62 (1936).

"Provided, that a law of a State which is more restrictive than a law of Congress shall govern."

This proviso seeks to assure that when both the federal and state governments exercise their "concurrent power", the federal law will govern except where the state law more stringently exercises the power to "restrict and prohibit" abortions. By this device, the prospect of abortion havens in particular states which would inhere in a purely "state's rights" approach would be curtailed by the enactment of a preemptive, minimum national standard. Although the objective of the proviso is undoubtedly sound, its actual legal effect must be examined in the light of the grant of "concurrent power."

The Eighteenth Amendment (Prohibition) is the only provision in the Constitution which expressly grants "concurrent power" to both the federal and state governments. As a result, the legal effect judicially accorded to that grant is relevant to an analysis of the probable legal effect of a like grant in the Life Amendment. Section 1 of the Eighteenth Amendment prohibited the manufacture, sale, transportation, import or export of intoxicating liquors for beverage purposes. Section 2 provided: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

Some of the early state and lower court federal cases applying the Eighteenth Amendment held or suggested that if a federal and state law were in conflict, the latter would have to yield under the federal supremacy clause in Article VI of the Constitution.[30] Others were of the view that there could be no irreconcilable conflict between two sovereigns attempting to enforce prohibition, albeit by different means.[31] The matter was settled by the Supreme Court in favor of the latter view. Beginning with the National Prohibition Cases[32], the Supreme Court held that the grant of concurrent enforcement power gave each sovereign equal and independent authority to enforce the national prohibition policy, and that the statutes of both could be enforced as the will of separate sovereigns.[33] The power of each was derived from different sources, in the case of the federal government the Eighteenth Amendment, and in the case of the states the general powers reserved to them by the Tenth Amendment.[34]

As a result of these basic principles, criminal sanctions could be imposed by both sovereigns for the same transaction without violating the Fifth Amendment guarantee against double jeopardy;[35]

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[30] See, e.g., Commonwealth v. Nickerson, 236 Mass. 281, 128 N.E. 273 (1920); State v. Ceriani, 96 Conn. 130, 113 A. 316 (1921); Ex parte Ramsey, 265 F. 950 (D.C.Fla. 1920).

[31] See, e.g., State v. Gauthier, 121 Me. 522, 118 A. 380 (1922); Jones v. Hicks, 150 Ga. 657, 104 S.E. 771 (1920).

[32] State of Rhode Island v. Palmer, 253 U.S. 350 (1920).

[33] United States v. Lanza, 260 U.S. 377, 381-382 (1922).

[34] Herbert v. Louisiana, 272 U.S. 312, 314 (1926).

[35] Vigliotti v. Commonwealth, 258 U.S. 403 (1922).

both federal and state legislative schemes were enforceable despite significant differences; indeed, a state law prohibiting the possession of liquor specifically licensed by federal law was sustained.[36] The only limitation upon either sovereign was that neither could validate acts or transactions which violated the prohibition of the Eighteenth Amendment; so long as their statutes furthered its purposes, they were enforceable.

It has been suggested that the grant of "concurrent power" in the Life Amendment, without the proviso, would lead to the result reached by the courts under the Eighteenth Amendment. However, because that result was tied to a particular substantive constitutional policy, and was developed in the course of construing a concurrent grant of power to enforce that policy, it is critical to examine and compare the nature of the grant in the Life Amendment.

As earlier noted, the Life Amendment does not expressly prohibit abortions or establish a lesser degree of restriction. Having substantively nullified a right to abortion under the Constitution, it liberates the states in the exercise of their reserved power under the Tenth Amendment to restrict and prohibit abortions. Concurrently, it grants the federal government coextensive authority. Each sovereign is vested with discretion regarding the manner in which it will exercise its authority. Thus, the parallel with the Eighteenth Amendment seems intact unless there is a vital distinction between a grant of concurrent power to enforce an express, absolute constitutional policy of prohibition (Eighteenth Amendment), and a grant of concurrent discretionary power both to establish and enforce basic policy (Life Amendment).

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[36] McCormick & Co. v. Brown, 286 U.S. 131 (1932); see also Idaho v. Moore, 212 P. 349 (1923); aff'd, 264 U.S. 569 (1924).

Although the Life Amendment does not contain an express prohibition as did the Eighteenth Amendment, the term, evident thrust and circumstances of ratification of the Life Amendment will clearly establish an unmistakable national policy to protect unborn life. The profound depth of that policy will be evident from the very fact that this nation will have expunged the decisional law which established a contrary policy. It is possible, therefore, that the federal judiciary would give effect to the law of each sovereign to the fullest extent of its restrictive or prohibitory provisions, upon an application by analogy of the Eighteenth Amendment cases. On the other hand, it must also be recognized that the concurrent power under the Life Amendment is as much a power to establish substantive policy as it is a power to enforce. Although policy decisions were also involved in the enforcement statutes under the Eighteenth Amendment, they involved less substantive latitude. The potential for conflict between the laws of two sovereigns under the Life Amendment may be greater. The analogy to the Eighteenth Amendment is less than precise.

It is the stated goal of the Life Amendment to render effective the "more restrictive" of the federal and state enactments. That is the purpose of the proviso. It requires that when both sovereigns act, what will emerge and be given effect are the legislative provisions which most effectively accomplish the goal of protecting the unborn. Although the fundamental object and purpose of the proviso are clear, its terms leave some open questions. For example, is a statute more restrictive because it enumerates fewer categories of exceptions to its prohibition, or because statistically the exceptions would lead to fewer abortions, or both reasons (perhaps) combined with others? In determining which law shall "govern", will the entire statutory scheme of each sovereign be compared and only one survive, or will there be a selective judgment made concerning competing, discrete provisions?

The issue involves highly technical legal questions which are now under critical discussion.[37] However, that is by no means cause for hesitancy in supporting the amendment. The principle is there, and it will undoubtedly be effectuated as well as words and the lawyers' skill allow. That is not to say that there will not eventually be a need for judicial interpretation. The action of two sovereigns may lead initially to some legal questions despite the tidiness of language or principle. However, this is often a consequence of broad constitutional provisions and may be a necessary aspect of adjusting to an amendment which recognizes a need for national standards without preempting the freedom of the people in each state to adopt more stringent standards to reflect their local values. In the end, we must also trust to the good will and judgment of the Congress to enact legislation which will present the fewest problems in its relationship to state laws.

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[37] For example, the proviso appears to assume that the supremacy clause (Article VI) of the Constitution would cause a state law to yield to an act of Congress, irrespective of which law more effectively restricts or prohibits abortion. Because of the grant of concurrent power, it is highly doubtful that the supremacy clause would apply.

CONCLUSION

The Life Amendment has thus far withstood expert legal comment remarkably well. It has been critically examined by the attorneys who are acknowledged leaders in the pro-life movement. Many have endorsed the Life Amendment as a sound proposal.[38] A few have not yet lent their support, primarily because of their longstanding commitment to a measure which would expressly denominate the unborn as persons and immediately provide for the prohibition of abortion. As I understand their concerns, they are more philosophical than legal. As I have shown, the Life Amendment is a legally sound vehicle for attaining the maximum protection of the unborn.

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[38] These include, for example, Dennis J. Horan, Esq. (Chairman, Americans United for Life Legal Defense Fund) ("Americans United"); Prof. John T. Noonan, Jr. (University of California, Berkeley); Prof. Victor G. Rosenblum (Northwestern University; Vice Chairman, Americans United); Prof. Richard Stith (Valparaiso University); Prof. Lynn D. Wardle (Brigham Young University).

Wilfred R. Caron

Distribution:

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NATIONAL CONFERENCE OF CATHOLIC BISHOPS
1312 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20005

March 10, 1982

MEMORANDUM

TO: Rev. Daniel F. Hoye,
General Secretary

FROM: Wilfred R. Caron,
General Counsel

RE: Human Life Federalism Amendment (S.J. Res. 110)

As I complete this supplement to my memorandum dated December 8, 1981 ("Principal Memorandum"), I am struck by a paradox in the present legislative situation which so imperils the unborn that it must arrest the immediate and sober attention of every pro-life conscience.

S.J. Res. 110 (the "Life Amendment") is practically assured of adoption in this Congress if it is supported by all who are devoted to the protection of the unborn. Those committed to abortion on demand correctly assess the Life Amendment as the most serious threat to constitutionalized abortion since Roe v. Wade.[1] Thus, the National Abortion Rights Action League (NARAL) has launched an "Emergency Campaign to Stop the Hatch Amendment" to "help NARAL meet this unprecedented threat to the right to choose abortion." (Emphasis added.) Yet, there are some in the pro-life movement who counsel opposition to the Life Amendment in the belief that it will not deliver as much protection for the unborn as other measures. That opposition, combined with the opposition of others, could defeat the Life

Amendment. If that is to be counted as a victory for the unborn, no one has yet successfully explained why. As I shall show, no analysis has been forthcoming which adequately demonstrates a legal basis for opposing the Life Amendment.

INTRODUCTION

The strictly legal concerns which have been put forward by several pro-life attorneys are few and are readily answered. They are stated in memoranda ("Opposing Memoranda")[2] which reflect a common theme with occasional, secondary embellishments. Before proceeding to legal analysis, however, it is important to make several observations which will help to put these memoranda in perspective.

In my Principal Memorandum I anticipated the possibility that objectivity could fall prey to eight years of single-minded commitment to protecting the unborn by overruling Roe v. Wade's denial of their Fourteenth Amendment personhood. I counseled (at 1-2):

> "It is at once evident that this new initiative to protect the unborn employs conceptually new means in pursuit of the traditional goal of the pro-life movement. Although we must examine it with prudent circumspection, it is essential that the analytical process be one of reasoned objectivity predicated upon certain fundamental guiding principles."

Among the principles I mentioned was adherence to established rules of interpretation which teach the importance of context and the lawmaker's intent. The Opposing Memoranda do not deny the validity of these principles, but neither do they follow them.

The Opposing Memoranda indulge in hypercritical philological analysis which has led to an erroneous portrayal of the Life Amendment. Regarding objectivity, it is difficult to consider the Opposing Memoranda as genuine efforts to give the Life Amendment its due. This is evident not only from the hypercriticism already mentioned, but other characteristics as well. Thus, the Opposing Memoranda are essentially adversarial in tone; they do not fully respond to the points made in my Principal Memorandum; and one or more of them engages in such polemical excesses as inflammatory language,[3] distortions of my Principal Memo (discussed below), and affronts to the Bishops.[4] These are not the hallmarks of reasoned objectivity.

As for the theological underpinnings of the Bishops' support of the Life Amendment, the Opposing Memoranda appear to claim a greater competence and a higher authority. Indeed, one lawyer assumed the role of moral theologian, suprisingly opined that a return to the pre-Roe v. Wade state's rights situation would be morally preferable to supporting the Life Amendment, and then accused the Bishops of "...a betrayal of the unborn child and of their sacred trust as moral leaders."[5] Obviously, it is the lawyer's job to present critical legal analysis, but it overtaxes the law degree to put it in service of claims to a philosophical and theological competence so impeccable as to justify such judgments.

The difficult question of whether to support the Life Amendment, or any measure to protect the unborn, involves not only legal questions, but others even more profound. The point has recently been well made by Rev. John G. Johnson, Chief Judge of the Court of the Diocese of Columbus, Ohio:

> "The abortion issue is a concatenation of several interlocking but distinct questions, each of which should be answered within the context of its own field of study. Among others, there are questions of biology, questions of philosophy, questions of morality, questions of jurisprudence and questions of public policy. Failing to distinguish these questions can result--must result--in muddled thinking. Failing to advert to the proper data and methods for answering each question can only lead to irresponsible conclusions."[6]

A disciplined adherence to this truth is essential. The opinions of lawyers respecting matters other than law are entitled to no special weight.

LEGAL DISCUSSION

Reduced to their essence, the Opposing Memoranda are predicated upon these two major assertions:

1. The Life Amendment will not defeat the right to terminate pregnancy established in Roe v. Wade under the mantle of the right to privacy, particularly in cases involving the health of the mother.

2. The Life Amendment affirmatively incorporates into the Constitution Roe v. Wade's holding that the unborn are not "persons" within the meaning of the Fourteenth Amendment.

From these erroneous premises, certain consequences are said to flow.

"A Right to Abortion is Not Secured by this Constitution"

The phrase "right to abortion" is attacked as an ineffective phrase because (a) Roe v. Wade does not literally employ it, (b) what is really at issue is the woman's qualified "right of privacy" and the state's interest in protecting fetal life, and (c) a woman's right to abortion may also be grounded in her constitutional right to be protected in her health. Because I treated these points in my Principal Memorandum, I refer to its contents and will hold this discussion to bounds appropriate to a supplement.

The term "right to abortion" is judicially understood as referring to the right to terminate pregnancy which *Roe* v. *Wade* found was encompassed in the Fourteenth Amendment right of privacy. I noted this in my Principal Memorandum (at 11-12) and cited authority. To put the point to rest, hopefully once and for all, I refer to the Supreme Court's own characterization of the right it recognized in *Roe* v. *Wade*:

> "In *Roe* we held that Tex. Penal Code, Art. 1196, which permitted termination of pregnancy at any stage only to save the life of the expectant mother, unconstitutionally restricted a woman's *right to an abortion*.... Our opinion recognized only her *right to an abortion under those circumstances*."[7] (Emphasis added.)

Objections to the efficacy of the phrase "right to abortion" are not only niggling; they do not accept language already employed by the Court whose interpretive authority over the Life Amendment will be final. This disposes of specifications (a) and (b) above.

As for specification (c), it is sufficient response to insist that due effect be given to the entirety of the first sentence of the Life Amendment. "A right to abortion is not secured *by this Constitution*." (Emphasis added.) The Life Amendment does not merely expunge a right to abortion only as it may arise on a particular theory, or claim its roots in a particular consitutional provision. Rather, it denies any constitutional predicate or roots for an asserted right to abortion. As I said in my Principal Memorandum (at 10-11):

> "Because *Roe* v. *Wade* engrafted a 'right' to abortion onto the Constitution, it is essential to expunge that right not only as it springs from the rationale of *Roe* v. *Wade*, but absolutely. Importantly, this provision is not tied to due process clauses, or to any other constitutional provision, in its abrogation of constitutional protection for a right of abortion. By virtue of this purposeful lack of specificity, it removes the possibility for grounding a right of abortion in any provision of the Constitution. To say that this amendment could overturn *Roe* v. *Wade's* holding that

> there is a constitutionally protected right of abortion, is to identify only one aspect of its broad ameliorative thrust."

The Opposing Memoranda do not confront this point. Rather they explore constitutional possibilities as though the Life Amendment were not as thoroughly purgative as it is.

The first sentence of the Life Amendment is susceptible of only one reasonable interpretation, i.e. the one stated above. That is so as a matter not only of its precise language, but also as a matter of its historical antecedents and the Life Amendment's grant of plenary authority to Congress and the states "to restrict and prohibit abortion." Plainly, the woman is explicity denied special constitutional prerogatives which can be cited to defeat legislative enactments restricting or prohibiting abortion. The suggestion that such legislation could be held unconstitutional as an infringement upon her constitutionally protected "right to health"[8] is devoid of merit because it fails to recognize the broad sweep of the Life Amendment. It also overlooks the fact that the right to abortion enunciated in Roe v. Wade was grounded, at least in part, in the pregnant woman's interest in her own health.[9]

"Nonpersonhood" of the Unborn

In the Life Amendment, neither the absolute purgation of the right to abortion nor the conferral of legislative power to restrict and prohibit abortion is a function of a particular status except that of being unborn. The unborn are to be protected irrespective of the outcome of legalistic, philosophical or other debates over whether and when the unborn are persons or human beings. In short, the Life Amendment gets down to cases and avoids the debate which to date has frustrated effective legislation. Before addressing the particular criticism contained in the Opposing Memoranda, it will be useful to comment on the exaggerated importance which has been attributed to Roe v. Wade's holding that the unborn are not persons under the Fourteenth Amendment.

As I observed in my Principal Memorandum (at 16), the Fourteenth Amendment does not guarantee life, but only that a person shall not be deprived of it without due process of law. Capital punishment survives that test in principle.[10] In the unique situation of pregnancy, recognition of the personhood of both mother and child would perforce lead to a choice of one when abortion is the issue. Constitutional experience teaches that the ensuing balancing of interests would provide no certain security for the unborn despite the badge of personhood. Indeed, even before Roe v. Wade's personhood holding, state enactments governing abortion were not considered violative of the Fourteenth Amendment although they permitted abortion to save the life of the mother and for less vital reasons related to her well-being. It seems certain that before Roe v. Wade knowledgeable constitutional lawyers would have conceded the shortcomings of "due process" personhood for the unborn.[11] Yet, because of some dicta in Roe v. Wade the authors of the Opposing Memoranda now perceive personhood as a secure haven.

In Roe v. Wade Justice Blackmun said that if the unborn were a person under the Fourteenth Amendment, "the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment."[12] This language has been substituted by some for constitutional principle and anaylsis. It is held out as a guarantee that personhood and protection come hand in hand. They do not! In the context of the case, the real significance of this robust but imprecise utterance is very much in doubt. First, it is merely dictum[13] and consequently does not constitute precedent in the binding sense of stare decisis.[14] Second, its character as judicial rhetoric supplies no meaningful guidance as to the choices the Court would make in resolving the due process issues when the interests of mother, child and state compete, especially considering the numerous combinations and permutations of those interests. The prospects for the unborn would probably be nil in cases where the mother's life (personhood) is at risk, with the degree of acceptable risk now an entirely open question. The prospects are no more certain where the health of the mother is involved, interpreted by the Courts to include "all factors--physical, emotional, psychological, familial, and the woman's age--relevant to well-being of the patient."[15] Although it may be assumed that due process personhood for the unborn would diminish the effect of the mother's "health" on her right to abortion, the extent of that effect is also an open question. Third, to depend entirely upon due process personhood for the protection of the unborn leaves them fully in jeopardy where purely private (mother and physician) action is involved.[16] To the extent abortions would not be prohibited by the state, they would be unimpeded by the Fourteenth Amendment personhood of the unborn.

At this juncture, it is useful to compare the protection of the unborn under the Life Amendment with that under their assumed Fourteenth Amendment personhood without the Life Amendment. In either case, the protection of the unborn depends upon the enactment of legislation. Second, under the Life Amendment the legislative power to protect the unborn is plenary and complete, unimpeded by a constitutionally protected right to abortion. As noted above, mere Fourteenth Amendment personhood would not yield nearly so salutary or predictable a result. Third, under the Life Amendment the power to protect the unborn extends both to private as well as state action, whereas the uncertain protection provided by Fourteenth Amendment personhood falls far short.

The authors of the Opposing Memoranda are so immersed in years of personhood disputation they do not see that the badge of personhood is neither necessary nor fully efficacious to protect the unborn. They castigate the Life Amendment for declining to make protection of the unborn dependent upon the shifting sands of due process personhood. More to the point, however, they wrongly accuse the Life Amendment of endorsing the Roe v. Wade conclusion that the unborn are not persons under the Fourteenth Amendment. Indeed, it is asserted that the Life Amendment would formally incorporate that proposition into the Constitution.

This criticism of the Life Amendment is unreasonable. Certainly the language of the Life Amendment does not support the charge. As noted, the Life Amendment does not explicitly ratify, nullify or address the Roe v. Wade personhood holding. Does it do so implicitly? Certainly not! Indeed, as I observed in my Principal Memorandum (at 16-17):

> "Not only does the Life Amendment empower the Congress and the several states to accord full protection to the unborn, but it calls into serious question and perhaps negates the Roe v. Wade denial of personhood for the unborn. I say this not so much because of an interdependence of that holding and the right of privacy holding, but because the Life Amendment clearly and firmly negates the primacy of the mother in the conflict of rights between mother and unborn child. Indeed, it resolves the conflict for constitutional purposes and fosters the primacy of the child in all circumstances. If the Life Amendment is ratified, how the Supreme Court would rule on the "personhood" of the unborn for other purposes is, at least, an open question. The Life Amendment provides new recognition of the unborn, a major "personhood" development. It seems wrong to fault the Life Amendment as compromising principle, and it seems even more wrong to suggest, as some have, that it ratifies Roe v. Wade's denial of personhood to the unborn."

I stand firmly on this statement, and the Opposing Memoranda have offered no persuasive rebuttal.

The only discernible attempt to support the charge by analysis is found in the contention that the unborn are treated as nonpersons because the Life Amendment leaves their protection to the legislative branch. The fallacy of this view is self-evident in light of the vast reservoir of power vested in government which can declare lives forfeit when the common good and public order require. My precise point is that we do not cease to be persons because we are subject to law. The law recognizes defenses to the crime of homicide but it does not condone the homicide. The law imposes the death penalty for serious crime but does not deny the personhood of the prisoner.

In short, it is fundamental error to assert that the Life Amendment treats the unborn as "nonpersons", or "rightless things", or "snail-darters" or "whales"[17] because it entrusts their care to the legislative branch. Such a view is not only conceptually unsound and logically indefensible, but it literally ignores the Life Amendment's denial of constitutional status to the right of abortion which has robbed the unborn of their rights since Roe v. Wade. As already noted, if the Life Amendment has any effect on the Fourteenth Amendment personhood of the unborn it will be to support it. Finally, I have already demonstrated that due process personhood does not affirmatively protect the unborn, but only restricts state action. By the logic of the Opposing Memoranda, under the due process clause the unborn are also nonpersons because their protection is likewise left to legislation.

Because it is clear that the Life Amendment does not explicitly or implicitly adopt the Roe v. Wade personhood holding, the adverse consequences envisioned by the Opposing Memoranda are moot. Thus, the Life Amendment would not preclude the Supreme Court from reconsidering its personhood holding in Roe v. Wade either through confrontation with a personhood statute such as S.1741 or by reason of other advocacy.

To conclude, the focus of the Objecting Memoranda is on the U.S. Constitution. However, it must be recalled that under the Life Amendment Roe v. Wade will not nullify the power of each state to declare the personhood of the unborn either legislatively or constitutionally. Whatever may be said of the status and utility of personhood for the unborn under the federal Constitution, it should be clear that personhood under state law would be alive and well.

The Meaning of "Abortion"

In their resolve to fault the Life Amendment, the Opposing Memoranda also question the efficacy of the term "abortion" to deal with fetal experimentation, and the destruction of unborn life before implantation or in connection with *in vitro* fertilization. Without at all wishing to deny the importance of this subject matter, it must be acknowledged that it constitutes a relatively small segment of the abortion problem. Nevertheless, the criticism of the Opposing Memoranda is not well-founded.

Before addressing these issues, I would refer to the treatment of the term "abortion" in my Principal Memorandum (at

12-15), which has been distorted by two of the Opposing Memoranda.[18] Because medical practice may consider that pregnancy commences with implantation, I noted in passing that "...abortion would include the intentional termination of unborn life from at least the time of implantation." (Emphasis added.) However, I observed further that the legal usage of the term expanded after the early common law, and that "...many Courts employed the term to refer to the intentional termination of pregnancy at any time between conception and normal birth." (Emphasis added.) I observed further that modern abortion statutes employ the term abortion in this expanded sense, as did the Texas statute in Roe v. Wade, and concluded the discussion with this statement: "In the last analysis, the meaning of the term 'abortion' (like every other), as used in the Life Amendment, will be determined according to its intended sense. For those who require even more certainty, the solution is definitive 'legislative' history."

The foregoing notwithstanding, the Baker Memo (at 13) remarks: "Legal counsel for the Catholic Bishops is apparently prepared to stipulate that pregnancy does not begin at conception". With similar license, the Rice Memo II (at 4) charges that I consider it the "intent and effect of the Hatch Amendment" to limit the restriction and prohibition of abortion to "post-implantation termination of pregnancy." Misleading remarks such as these ignore or overlook the entirety of my discussion. They are especially to be regretted because they come from the academic community.

Fetal Experimentation. The Opposing Memoranda suggest that the Life Amendment would not authorize legislation dealing with such matters as fetal experimentation and in vitro fertilization. The term "abortion" used in the Life Amendment is broad enough to encompass legislation designed to protect unborn human life in all circumstances and stages of development. The Supreme Court itself used the term very broadly to refer to extraction of the unborn at any time before normal childbirth.[19] As already noted, the accepted legal sense has expanded. For example, Black's Law Dictionary (5th ed.) defines "abortion" simply as "[t]he knowing destruction of the life of an unborn child or the intentional expulsion or removal of an unborn child from the womb other than for the principal purpose of producing a live birth or removing a dead fetus." The expanded legal applications, together with the Amendment's broad ameliorative sweep, would seem to assure that any destruction or removal of a fertilized ovum would come within the reach of possible legislation where the intent is other than to produce a live birth.

It must be kept in mind that the first sentence of the Life Amendment would remove all constitutional protection from any purported right to abortion. Once this is accomplished, legislation restricting or prohibiting abortion would no longer be impinging upon a fundamental constitutional right. Congress or any state could enact any legislation which is rationally related to its constitutionally recognized interest in restricting and prohibiting abortion. It is unlikely under this regimen that legislation prohibiting removal of a fertilized ovum at any stage of development could be invalidated.

By reasonable extension, the destruction of ova fertilized outside the womb would be equally subject to legislative control. It would be absurd to argue that because fertilization had taken place outside the womb the matter had been placed beyond legislative power to protect human life.

CONCLUSION

There is no valid legal objection to the Life Amendment, at least none that I have been able to find or that the Opposing Memoranda have been able to support. What emerges is essentially a dispute concerning what is morally required, based in part upon conflicting legal analyses. Thus it is that lawyers enter realms for which they have no special professional competence, namely, the political, philosophical and theological. What emerges with equal clarity is that the Opposing Memoranda directly or indirectly advance the cause of other legislative initiatives. The Opposing Memoranda are not objective legal analyses of the Life Amendment, my Principal Memorandum or the supportive statements given by many outstanding lawyers in the leadership of the pro-life ranks.[20] Deep down they are advocates' briefs for other solutions.

We are at a crossroads. Those who support the Life Amendment, including the Bishops, are fully committed to the protection of the unborn and a solution to the problem and evil of abortion. They view the Life Amendment as "an achievable solution to the present situation of abortion on demand."[21] They do not believe that in the present or foreseeable climate of opinion an absolute constitutional prohibition of abortion is achievable.

These are the true parameters of the dialogue between the critics of the Life Amendment and its supporters. Purported legal criticisms of that amendment which focus on the matter of personhood should be viewed as nothing less than the expression of a differing point of view on a question of policy grounded in moral considerations. It is not within the scope of this paper to deal with the complex political, philosophical and theological assessments which underlie the decision of the Bishops to endorse the Life Amendment. Suffice it to say that those who attack the Life Amendment on these grounds differ with the collective expertise, wisdom and authority of the hierarchy of the Catholic Church in the United States, and the judgment of persons of good will who are associated with other religions.

I am left with a deep concern for those devoted to the protection of the unborn, for whom the legal debate must surely be a source of anguished disquiet. Nonlawyers cannot judge whether a legal argument has validity in the law, although they can surely often discern where logic and common sense lie. The difficulty is that logic and law are not always together, law being an art which depends only partly on logic for its results. In the end, we must encourage Catholics who are torn by the legal debate to place their confidence where faith leads them. If they have faith in the intelligence and moral commitment of the Bishops, then they will accept their judgment and leadership. If not, then of course they will follow a different leadership.

Wilfred R. Caron

Distribution:
- All Bishops
- Diocesan Attorneys
- State Catholic Conference Directors
- Diocesan Pro-Life Directors
- Other Interested Persons

FOOTNOTES

1. 410 U.S. 113 (1973).

2. J. Baker, The Hatch Amendment (1982) ("Baker Memo"); R. Byrn, Memorandum In Opposition to S.J. Res. 110 (undated) ("Byrn Memo"); Rice, *The Hatch Amendment Is Not the Answer*, The Wanderer, November 28, 1981, at 1 ("Rice Memo"); Rice, *Supportive Memo on Hatch Amendment Reveals Glaring Deficiencies in SJR 110*, The Wanderer, January 7, 1982, at 4 ("Rice Memo II"); J. Witherspoon, Constitutional Protection of Unborn Children: An Examination of the "Hatch Amendment" (February 3, 1982) ("Witherspoon Memo").

3. For example, the Byrn Memo (at 4) charges the Life Amendment with treating the unborn as "rightless things" comparable to "snail darters" and "whales." The Witherspoon Memo (at 4) speaks of "things", "chattels" and "slaves."

4. For example, the Rice Memo (at 6) accuses the Bishops of supporting a measure (the Life Amendment) which legitimatizes "legalized abortion" and which "is at war with the authentic teachings of the Catholic Church."

5. Rice Memo II at 7.

6. See Johnson, *The Dynamics of the Abortion Debate*, America, February 13, 1982, at 106.

7. *Connecticut* v. *Menillo*, 423 U.S. 9, 10 (1975).

8. Byrn Memo at 6-9.

9. *Roe* v. *Wade*, 410 U.S., at 153; *Connecticut* v. *Menillo*, 423 U.S., at 10.

10. *Gregg* v. *Georgia*, 428 U.S. 153, 177 (1976).

11. *See*, *e.g.*, the Uniform Abortion Act, drafted and approved by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association in 1972, which is set forth in the margin in *Roe* v. *Wade*, 410 U.S., at 146, (allowing abortion during the first 20 weeks of pregnancy in cases of endangerment to the life or health of the mother, grave physical or mental defect of the fetus, and rape [including illicit intercourse with a girl under 16 years of age] or incest).

12. *Roe* v. *Wade*, 410 U.S., at 156-57; *see also id.*, at 157 n. 54.

13. Statements in a court's opinion which go beyond the narrow question stated and decided by the court, and which are not necessary to the court's decision, are regarded as "dicta." *Technograph Printed Cir* v. *Packard Bell Electronics Corp.*, 290 F. Supp. 308 (C.D. Cal. 1968).

14. Lower courts, federal and state, are bound to follow precedents of the United States Supreme Court. *Salerno* v. *American League of Prof. Baseball Clubs*, 429 F.2d 1003, 1005 (2d. Cir. 1970), cert. denied, 400 U.S. 1001 (1971); *United States* v. *Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971). However, it is well settled that

neither the Supreme Court nor inferior courts are bound under the principle of *stare decisis* to follow dicta from previous opinions of the Court. *Williams v. United States*, 289 U.S. 553, 568 (1932); *Cohens v. Commonwealth of Virginia*, 19 U.S. 264, 398 (1821); *Cameron v. Mullen*, 387 F.2d 193, 197 (D.C. Cir. 1967).

15. *Doe* v. *Bolton*, 410 U.S. 179, 192 (1973).

16. *Civil Rights Cases*, 109 U.S. 3 (1883); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974).

17. See Note 3, supra.

18. Rice Memo II at 4; Baker Memo at 13-14.

19. *Roe* v. *Wade*, 410 U.S., at 163-64; Noonan, A Private Choice 150 (1979).

20. As pointed out in my Principal Memorandum, these include, for example, Dennis J. Horan, Esq. (Chairman, Americans United for Life Legal Defense Fund) ("Americans United"); Prof. John T. Noonan, Jr. (University of California, Berkeley); Prof. Victor G. Rosenblum (Northwestern University; Vice Chairman, Americans United); Prof. Richard Stith (Valparaiso University); Prof. Lynn D. Wardle (Brigham Young University).

21. Testimony of Archbishop John Roach before the Senate Subcommittee on the Constitution, November 5, 1981, reprinted in Origins: NC Documentary Services, November 19, 1981, at 357-59.

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The Hatch Amendment: Invading Privacy, Misusing the Constitution

The Senate Judiciary Subcommittee on the Constitution has approved a constitutional amendment aimed at overturning the 1973 Supreme Court decisions upholding a woman's right to abortion. The amendment, sponsored by Sen. Orrin Hatch (R-Utah), chairman of the subcommittee, is expected to be considered by the full Judiciary Committee early this year. If it passes the committee, Sen. Hatch intends to move for early consideration by the full Senate, which could occur this spring.

Sen. Hatch's amendment (S.J. Res. 110), which he has entitled the "human life federalism amendment," provides:

> The right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortion: Provided, That a law of a State which is more restrictive than a conflicting provision of a law of Congress shall govern.

The amendment is being promoted by its supporters as a moderate approach that would simply allow Congress and the state legislatures to regulate abortion. As many constitutional scholars pointed out during the subcommittee's hearings, however, the measure would give government a major new power to intrude into private decisions by individuals and, in doing so, would misuse the process for amending the Constitution in a way that has profound implications for all constitutional rights.

Roe v. Wade: What the Court Held

By a 7-2 margin, the Court in January 1973 held that the constitutional right of privacy encompasses a woman's decision, made in consultation with her physician, to have an abortion. The Court found the right of privacy to be a "fundamental right," which, although not absolute, may not be restricted unless a state can show a "compelling" reason for doing so. The Court said that until the fetus is viable (able to live outside the womb), a state may not place any restrictions on the reason for an abortion, although after the first trimester of pregnancy, the state's interest in safeguarding maternal health is sufficiently compelling to permit some regulation designed to further that interest. After viability, the Court determined, a state's interest in protecting potential life is sufficiently strong to allow the state to prohibit abortion, except when it is necessary to preserve the woman's life or physical or mental health.

The Right of Privacy: Is it New?

There is no explicit reference in the Constitution to a right of privacy, but in a line of cases going back to 1891, the Supreme Court has recognized that a right of personal privacy, or a guarantee of certain areas of privacy, is protected by the Constitution. As the Court noted in a 1969 decision, "Also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.[1] Quoting from an opinion written by Justice Louis Brandeis in 1928, the Court added, "The makers of our Constitution...conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized man."[2]

In Roe v. Wade, the Court said that the right of privacy encompassing the abortion decision was found in the concept of liberty guaranteed by the due process clause of the 14th Amendment. In other contexts, however, the Court has also found a right of privacy to be rooted in the First Amendment's guarantee of freedom of speech and press; the Fourth Amendment's prohibition of unreasonable searches and seizures; the Fifth Amendment's privilege against self-incrimination; the Ninth Amendment's provision that the enumeration in the Constitution of certain rights is not to be construed to deny others retained by the people; and in the Bill of Rights generally (which was the basis for the Court's 1965 decision in Griswold v. Connecticut[3] holding that the right of privacy protected the right of married persons to use contraceptives).

The 14th Amendment's Protection of the Right of Privacy: How Has it Been Applied?

In several decisions, the Court has made it clear that freedom of personal choice in matters of marriage, reproduction and family life is one of the liberties protected by the due process clause of the 14th Amendment. The Court has found that this right of personal privacy protects the right to marry, the right to bear children and the right to use contraception, family relationships and the right of parents to raise and educate their children. In a 1923 decision, for example, the Court ruled that the right "to marry, establish a home and bring up children" was an essential part of the liberty guaranteed by the 14th Amendment.[4] Two years later, the Court held unconstitutional an Oregon law that prohibited parents from sending their children to private schools. The Court said that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[5]

When it extended the right of privacy to include a woman's decision to have an abortion, the Court observed: "Certainly, the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school."

Testifying before the Constitution Subcommittee during hearings on the Hatch amendment, Professor Laurence Tribe of Harvard pointed out that "many who applaud the Supreme Court decisions finding parental and familial rights to be implicit in the liberty clause of the 14th Amendment express dismay that the Court should have pursued precisely the same constitutional method in finding an implicit right of a woman to decide whether or not to have an abortion."

Supporters of the Hatch amendment contend that it would "reenfranchise" all the people, thus allowing the abortion issue to be settled by the democratic process rather than by a few justices imposing their personal views. Under our system of government, however, certain fundamental rights are not subject to majority rule, and numerous constitutional experts have warned against abridging personal freedom in the name of carrying out the popular will. "The right to choose abortion is a basic liberty protected by the 14th Amendment," Professor Tribe stressed. "We don't arrive at liberties through consensus...Democracy has always been limited" by judicial interpretations to safeguard basic rights.

Roe V. Wade: A Decision Without Precedent?

The Supreme Court in Roe v. Wade simply extended the traditional and well-established limitation on the power of the government to intrude in individual's private lives. The decision, moreover, was a logical extension of the Court's earlier opinions holding that the right of privacy includes the right to use birth control. In 1972, the Court held in Eisenstadt v. Baird[6] that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." As Professor Tribe reminded the subcommittee, "It is...unthinkable...to defend the liberty of the individual to avoid conception while upholding the power of the state to punish abortion from the point of conception onward."

The Hatch Amendment: Part of a Long-Range Strategy to Outlaw Abortion

Some supporters of the Hatch amendment maintain that the proposal is a moderate one that would simply "deconstitutionalize" abortion by taking the issue out of the jurisdiction of the courts and returning it to elected representatives. In point of fact, however, the Hatch amendment is not moderate. Instead, it would allow Congress and state legislatures, by simple majority votes, to prohibit abortion. Supporters of S.J. Res. 110 clearly intend to seek such legislation. Sen. Hatch has stated publicly on numerous occasions that if his amendment is adopted he would be "among those seeking the most restrictive state and federal laws with respect to abortion." Similarly, the Catholic bishops, who have come out in support of the amendment, have said they will push for a restrictive national abortion law if S.J. Res. 110 is ratified.

S.J. Res. 110: A Dishonest and Dangerous Tactic

The Hatch amendment attempts to establish a procedural framework that would allow simple majorities in Congress and the states to overturn a constitutional right. If it prevails, the amendment would set a dangerous precedent that transcends the abortion issue.

The process of amending the Constitution requires that an amendment is passed by two-thirds of each house of Congress and then be ratified by three-quarters of the states. (The Constitution may also be amended by a constitutional convention followed by ratification by the states, but this method has never been attempted.) By their own admission, supporters of the Hatch amendment do not have the votes either in Congress or the states to outlaw abortion directly by amending the Constitution in this time-honored fashion. Instead, the Hatch amendment would pervert the nature and purpose of the amendment process. That process was intended to be difficult, so that it would only succeed if there was a national consensus on an important issue. To achieve its objective, the Hatch amendment needs no such consensus. Rather, it would grant simple legislative majorities in Congress and state legislatures to revoke a fundamental personal right and to pass legislation along the lines of the human life statute (S. 158, S. 1741), which declares that the fetus is a person from the moment of conception protected by the 14th Amendment. (In Roe v. Wade, the Court said the word "person" in the 14th Amendment does not include the unborn.) If it succeeds, there is no reason why the same tactic could not be used to eliminate other fundamental rights now guaranteed by the Constitution.

This "back door" approach to prohibiting abortion has been sharply criticized by many constitutional scholars. University of Pittsburgh law professor Tom Gerety told the subcommittee that the Hatch amendment does not take the abortion issue "straight as a moral and constitutional question, [but instead] turns it into a procedural and political one. Bare majorities will, under this amendment, decide the question in this state and that...This is the Missouri Compromise on abortion," Gerety declared, adding that "the debate over abortion is a national debate over the moral content of our national Constitution." The only way to settle the abortion question, said Gerety, who is opposed to any constitutional amendment on abortion, "is to offer to the nation the plain moral judgement that abortion must be prohibited." In this way, we would see if there is constitutional majority who believes that abortion is so wrong that it should be prohibited.

Support for an Abortion Amendment: What the Public Opinion Polls Show

Since 1973, public opinion polls have indicated that the American public, by a large majority, has consistently opposed a constitutional amendment prohibiting abortion. Whatever their personal beliefs about the morality of abortion, recent national polls conducted by Yankelovich, Skelly and White, ABC/The Washington Post and The Associated Press show that roughly 70 percent of the American people believe that any woman who wants an abortion should be able to have one. Despite the intense efforts of antiabortion groups to win support for an amendment, that percentage has remained remarkably constant over the years.

While some people who oppose a constitutional amendment prohibiting abortion indicate that they might support some restrictions on abortion, relating either to the reason for the procedure or to such issues as parental or spousal consent or notification, the polls show clearly that there is no consensus as to what those restrictions should be. In the face of such a lack of consensus, wisdom and experience argue against imposing restrictions.

Although they acknowledge the lack of support for an antiabortion amendment outlawing abortion, proponents of the Hatch amendment contend that S.J. Res. 110 would help to build a consensus in favor of such a measure. Several witnesses cautioned the subcommittee, however, that a constitutional amendment should not be used to create a consensus but to enshrine a consensus that has already developed. Sen. Patrick Leahy (D-Vt.) observed that "amendments to the Constitution have generally reflected the outcome of issues resolved by the American people, sometimes after generations of debate and deep divisions of opinion. Where we amended the Constitution without a national meeting of the minds," said Leahy, referring to the 18th Amendment [Prohibition], "we were forced to retract the amendment [the 21st Amendment], and only after devastating effects on society," including the fostering of organized crime.

Many constitutional scholars believe that the Hatch amendment, like Prohibition, would not work and would breed disrespect for the law. "Prohibition [of abortion] will be ugly, it will be hurtful, and it will not work," Professor Gerety predicted. "To intrude so drastically on the lives of women without a moral consensus seems to me a legal and constitutional folly."

The Constitution: When Has It Been Amended to Overturn a Supreme Court Decision?

On four occasions, the Constitution has been amended in response to an unpopular decision by the Supreme Court: The 11th Amendment was ratified to overcome a 1793 decision permitting the federal courts to hear cases in which citizens of one state sued another state (the amendment expressly prohibits the federal courts from hearing such cases); the 14th Amendment overturned the Court's 1857 *Dred Scott* decision holding that blacks were not citizens under the Constitution;[7] the 16th Amendment overturned an 1895 decision that a national income tax on individuals was unconstitutional; and the 26th amendment overturned a 1970 decision that Congress lacked the authority to extend to 18 year olds the right to vote in state and local elections.

Not one of these amendments took away or rolled back a personal liberty, as the Hatch amendment would do. As law professor Norman Dorsen of New York University pointed out to the subcommittee, the Hatch amendment "would upset the delicate constitutional balance in an unprecedented and dangerous way. On no prior occasion, except for the ill-starred Prohibition amendment, has the Constitution been altered to destroy rather than add to the sum of individual rights held by Americans."

The Hatch Amendment: Its Impact on the Right to Abortion

The amendment would not automatically outlaw abortion, but would give Congress and state legislatures the authority to prohibit abortion by simple majority votes. Some states, certainly, would quickly do so, which, at the very least, would result in many women being denied access to abortion because, for financial reasons or on account of their youth, they would be unable to travel to a state where abortion was legal. Unlike the period before *Roe v. Wade*, however, when states could choose whether, and under what circumstances to permit abortion, Congress for the first time, would have the power to override a state's decision not to interfere in a woman's decision to have an abortion and to impose restrictive legislation on the entire country. On the other hand, the hatch amendment would, also for the first time, establish in the Constitution the principle that a state law would prevail over a federal statute if the state abortion legislation is stricter. (Under the Constitution's Supremacy Clause, a federal statute takes precedence when it conflicts with a state law.) Berkeley law professor Herma Hill Kay testified that if the Hatch amendment is adopted, "The Constitution would...permit individual states to nullify within their borders rights conferred by federal statute." Yet, she pointed out, "The Constitution would not...recognize state action that gave greater protection to the pregnant woman than Congress has afforded." As a result, Kay concluded, the Hatch amendment "embodies the worst of two alternatives: it neither permits the states to arrive at their own, locally acceptable, solutions to the abortion question, nor does it establish a uniform federal standard that all states must respect."

Since it is likely that state and federal abortion laws would vary widely, the Hatch amendment would be certain to generate endless litigation to determine, on a state-by-state basis, which law was more restrictive and therefore would govern. Courts would have to determine, for example, whether a state law permitting abortion to save the the woman's life and in cases of pregnancy resulting from rape or incest was more or less restrictive than a federal law allowing abortion to prevent the woman's death and in cases of fetal deformity. The possibilities for conflicting provisions is endless. Furthermore, the chaotic legal situation could continue indefinitely, since Congress and the states would be free to change their abortion laws at anytime.

The Right to Life Groups: Their Position on the Hatch Amendment

The Hatch amendment has sharply divided the right to life groups. The Catholic bishops and the National Right to Life Committee, the major antiabortion groups, have endorsed the measure, but the endorsements have generated considerable opposition within their own ranks as well as in the right to life community generally. The Hatch amendment, and the bishops' endorsement of it, have been bitterly denounced as a betrayal of the movement's long cherished principle that a constitutional amendment must guarantee that the fetus is a "person" entitled to the full protection of the law. Critics assert that since the Hatch amendment does not require the states and Congress to outlaw abortion, it confirms the Supreme Court's decision in *Roe v. Wade* that the fetus is not a person within the meaning of the 14th Amendment. "The essence of the abortion issue is simply whether the unborn child possesses the unalienable right to life," one critic wrote. "The right to life of a person cannot be subject to extinction at the discretion of any legislature, whether Congress or that of a state."[8]

Opponents of the Hatch amendment contend that the bishops and others who support it have betrayed the movement's principle for the sake of political expediency, which, in fact, appears to be why the bishops for the first time have endorsed a specific constitutional amendment. Testifying before Hatch's subcommittee, the president of the National Conference of Catholic Bishops, Archbishop John Roach, acknowledged that there was a "strong urgency to get something" and that the Hatch amendment "has a good-chance of passage." His comments are a far cry from the bishops' long-standing position that any constitutional amendment must, at the very least, establish the unborn child as a person under the Constitution from the moment of conception and declare the unborn's inalienable right to life. Presumably, however, the bishops concur in Senator Hatch's assessment that there "can be absolutely no doubt in anyone's mind that there is not currently the kind of consensus for [a human life amendment]--either in the country or in Congress... Nor is such a consensus imminent."

Most of the right to life groups that refuse to endorse the Hatch amendment are supporting Sen. Jesse Helms's (R-N.C.) human life statute, which does recognize the "personhood" of the fetus. The Helms bill has been widely denounced by the medical, legal and scientific communities, however, as unconstitutional and an inappropriate subject of congressional legislation. It is not clear at this point what action, if any, these groups would take if the amendment is passed by Congress and sent to the states for ratification. If they decide actively to oppose the measure, its defeat seems assured. If, however, they follow the bishops and the NRLC in supporting the Hatch amendment, having concluded that it is the best they are going to get for the foreseeable future and that something is better than nothing, the battle to defeat the Hatch amendment would be considerabley more difficult.

Footnotes

[1] Stanley v. Georgia, 394 U.S. 557 (1969).

[2] Dissenting in Olmstead v. United States, 277 U.S. 438 (1928).

[3] 381 U.S. 479 (1965).

[4] Meyer v. Nebraska, 262 U.S. 390 (1923).

[5] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[6] 405 U.S. 438 (1972).

[7] Right to life proponents frequently charge that denying personhood to blacks is comparable to denying personhood to the unborn. The *Dred Scott* decision was overturned by the 14th Amendment because of a moral consensus that slaves, whose status as "persons" was never questioned, were entitled to the same constitutional protection as other citizens. The 14th Amendment has never been interpreted as applying to the unborn, however, and there is no comparable moral consensus today that personhood should be extended to the fetus.

[8] C. E. Rice, "A Prescription for Disaster," *The Wanderer*, September 24, 1981, p.1.

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Abortion in the U.S.: Two Centuries of Experience

The human life federalism amendment, S.J. Res. 110, seeks to overturn the 1973 Supreme Court decisions on abortion by giving the states and the federal government concurrent power to restrict or entirely prohibit this medical service.

Supporters of the measure contend that the U.S. Supreme Court, by finding that a woman's right to choose an abortion is part of the fundamental and constitutionally protected right to privacy, usurped the rightful prerogative of the legislative branch of government. According to Sen. Orrin G. Hatch (R-Utah), chairman of the Senate Judiciary Subcommittee on the Constitution and the sponsor of the measure, "Quite apart from the merits or demerits of this abortion right, much of the controversy that has been generated about it has stemmed from the manner in which it has been achieved. It has emerged, not through the representative legislative processes, not through a newly developing social consensus, not through an amendment to the Constitution and not in response to any revolution in moral and ethical principles that might have been reflected through evolving federal and state policies."

Such an interpretation of the Court's action is a gross misreading of the history of abortion in the United States.

Abortion has had a long social and legislative history in this country; it was not "created" by fiat by the Supreme Court in 1973. Abortions early in pregnancy were permitted by traditional common law and were not prohibited in the United States until the middle of the nineteenth century. By the time the Court issued its decisions, 17 states had reformed or repealed these antiabortion laws, and similar legislation had been initiated in almost every other state in the nation. Even before 1973, national surveys showed growing public support for legal abortion and several national medical, legal, religious and social welfare organizations issued calls for abortion law reform. In 1972, the year before the Court's action, nearly 600,000 women received legal abortions in the United States. Rather than "creating" abortion in its 1973 decision in Roe v. Wade and Doe v. Bolton, the Court appropriately ratified an emerging national concensus on the issue.

What Was the Legal Status of Abortion Under English Common Law?

English common law, the cornerstone of American jurisprudence, did not recognize the legal existence of a fetus in criminal cases until "quickening," the first perceptible fetal movement which usually occurred after the fourth month of pregnancy. As a result, abortions performed prior to "quickening" were not criminal offenses. Since no state enacted conflicting legislation during nearly the first third of our nation's history, this traditional common law principle prevailed. The medical literature of the day, both popular and professional, included frequent references to methods of abortion.

When and Why Did the Legal Status of Abortion Change?

An 1821 Connecticut statute making abortions illegal after "quickening," and similar ones enacted in 10 states during the following 20 years, did not change the legal status of abortion, they merely codified the common law tradition. The first state law to deal separately and explicitly with abortion was not passed until 1845, when Massachusetts made abortion, or attempted abortion, a criminal offense at any point in pregnancy.

A nationwide campaign to restrict abortion was led by medical professionals out of a dual concern for public health and for establishing medicine as a profession peopled by formally trained "regular" physicians rather than the untrained "irregulars" and lay-healers who frequently performed abortions. According to James Mohr, author of Abortion in America, "By raising the abortion question and by highlighting the abuses and dangers associated with it, regular physicians could encourage the state to deploy its sanctions against their competition."

What Restrictive Laws Were Enacted?

By the turn of the century, almost all states had followed the example set by the 1845 Massachusetts law and enacted restrictions. In the early 1960s, although only Pennsylvania prohibited all abortions, 44 states allowed abortions only if the life of the pregnant woman would be endangered if the pregnancy were carried to term. Alabama, Colorado, New Mexico, Massachusetts and the District of Columbia permitted abortions if the life or physical health of the pregnant woman was in jeopardy; Mississippi allowed abortions in cases of life endangerment or rape. In nine states, the laws included criminal penalties for aiding, assisting, abetting or counseling a woamn in obtaining a criminal abortion. Fourteen states explicitly made obtaining an abortion, as well as performing one, a crime.

Did Legal Restrictions Prevent Abortions?

The exact number of illegal abortions cannot by determined. Nevertheless, several studies indicate that abortion was widespread despite the legal restrictions. In a nationwide study conducted in the 1940s, Dr. Alfred Kinsey found that 22 percent of the married women interviewed had had one or more abortions in marriage by age 45. Further, between 88 and 95 percent of the premarital pregnancies in his study were terminated by abortion.

Experts convening at the 1955 Arden House Conference on Abortion in the United States concluded that a reasonable estimate of the actual annual number of abortions could be as low as 200,000 or as high as 1.2 million. Another analysis, extrapolating from data obtained in North Carolina, estimated that 699,000 illegal or self-induced abortions occurred nationwide in 1955 and 829,000 in 1967. Based on his examination of the change, or lack of significant change, in the birth rates in New York City following the legalization of abortion, Dr. Christopher Tietze of the Population Council estimated that 50,000 illegal abortions, 70 percent of the number of procedures performed subsequent to legalization, had been performed in New York City.

One indicator of the extent to which abortions were performed is the death toll. In 1930, abortion was reported as the cause of death for 2,700 women in the United States, 18 percent of all maternal deaths. By 1940, the number decreased to just under 1,700 and further to 316 in 1950. Mostly because of advances in the technology of providing abortions, the number of deaths due to abortion in 1965 fell to 235, but still comprised 20 percent of all deaths related to pregnancy and childbirth in that year.

Along with the number of women who died, the number of women who suffered severe complications from illegal abortions shows the prevalence of the illegal procedures. At Harlem Hospital Center, only one of many New York hospitals, nearly 1,600 women were admitted for incomplete abortions in 1962, a rate of one abortion-related admission for every 42 deliveries at the hospital. In 1968, the University of Southern California-Los Angeles County Medical Center, another large public facility serving primarily indigent patients, admitted 701 women with septic abortions.

Did Any National Organizations Support Reform of Antiabortion Laws Prior to the Supreme Court Decisions on Abortion?

Well in advance of the 1973 Supreme Court decision, many national health, legal, religious and social welfare organizations issued either calls for reform or repeal of antiquated state antiabortion laws or declarations that abortion was a matter to be decided by an individual woman and her physician. One of the firt national calls for a change in abortion laws came in 1962 from the American Law Institute (ALI) with the publication of its "Model Penal Code on Abortion" which called for abortion to be legal when the pregnant woman's life or health would be endangered if the pregnancy were carried to term, if the pregnancy was the result of rape or incest and when the fetus had been diagnosed as afflicted with a severe defect. This recommendation, a model for abortion reform legislation in several states, was accepted by the American Bar Association in a 1972 resolution.

By the time the Supreme Court issued its decisions, numerous other organizations had joined the call for reform. Among the health and social welfare organizations to support reform were the American Association of University Women, American College of Obstetricians and Gynecologists, American Home Economics Association, American Public Health Association, National Association of Social Workers and the Young Women's Christian Association. In June of 1970, the American Medical Association passed a resolution stating the abortion is a a medical procedure to be performed by duly licensed physicians in conformance with the standards of good medical practice and the laws of their states. At least 19 state medical societies also voted to recommend that the antiabortion laws of their states be reformed or repealed.

Many national religious organizations called for reform or repeal laws before 1973. A 1965 resolution passed by The American Ethical Union urging reform of abortion laws was followed by similar action by the American Baptist Churches (USA), Church of the Brethren, Lutheran Church in America, National Council of Jewish Women, Presbyterian Church in the United States, Unitarian Universalist Association, United Methodist Church, United Presbyterian Church (USA) and the United Synogogue of America.

Did the American Public Support Abortion Law Reform Before the Supreme Court Decisions?

Even before the Supreme Court's 1973 abortion decisions, a majority of Americans supported legal abortion under at least some circumstances. A national survey taken by the Gallup organization in 1972 found that 64 percent of all Americans felt that the decision to have an abortion should be made solely by a woman and her physician. Also in 1972, the National Opinion Research Center found that 87 percent of the public felt that a woman should be able to obtain a legal abortion if her health was endangered.

Were Any State Abortion Laws Reformed or Repealed by State Legislatures Prior to The 1973 Supreme Court Decisions?

In 1967, Colorado reformed its antiabortion law to permit abortions in cases of life endangerment, if the pregnant woman's physical or mental health would be imperiled if the pregnancy were carried to term, if the fetus would be born with a severe physical or mental defect or if the pregnancy had resulted from rape or incest. By 1972, the year before the U.S. Supreme Court abortion decision, Arkansas, California, Delaware, Florida, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina and Virginia had adopted similar laws. In nine of these states, the new law did not specify a point of gestation until which abortions could be performed.

Beginning in 1970, four states (Alaska, Hawaii, New York and Washington) repealed their antiabortion laws, substituting statutes permitting an abortion if the woman and her physician felt the procedure was necessary. All of these states essentially permitted abortions only if performed prior to viability, the point in pregnancy at which a fetus can survive outside of the womb, unless the woman's life were in jeopardy. Washington's antiabortion law was repealed following passage of a statewide referendum on the question.

Were These 17 States the Only Ones to Take Legislative Action to Reform Antiabortion Laws?

Although the remaining 33 states enacted no legislation on abortion between 1967 and 1973, at least 124 bills to reform or repeal abortion laws were introduced in at least 28 of these states. Only in Alabama, Louisiana, South Dakota, West Virginia and Wyoming were no bills introduced. Eleven of these bills did pass at least one house of a state legislature. Of the 11 that passed at least one house, three would have permitted abortions by licensed physicians in Arizona, Michigan and Nevada and two were abortion law repeal measures in Arizona and Kansas. Two bills to reform abortion laws even further in states that had already enacted limited reforms in the 1960s also came close to being approved. In North Carolina, a bill to permit abortions performed by licensed physicians passed the House but was defeated by the Senate. A similar reform of Maryland's law passed both houses of the legislature but was vetoed by the governor.

Were Legal Abortions Performed in the U.S. as a Result of the Laws Enacted Between 1967 and 1973?

According to the federal Center for Disease Control, 586,760 women received legal abortions in the United States in 1972, the year before the U.S. Supreme Court decisions. While nearly 55 percent of these abortions (323,400) were performed in the four states that had repealed their antiabortion laws, 34 percent of the procedures were performed in the 13 states that had enacted more limited reforms of their antiabortion laws. Although nearly 600,000 women were able to obtain legal abortions in 1972, the Center for Disease Control estimates that 130,000 women were unable to obtain legal abortions and resorted to illegal or self-induced procedures during that year.

Did Women Who Lived in States Where Abortion Was Illegal Travel to Obtain Legal Abortions in 1972?

Approximately 200,000 women who could afford transportation costs traveled outside their home states to obtain abortions in 1972. Twenty-two thousand women from New Jersey obtained abortions in a different state, presumably New York. Over 10,000 women left Illinois in order to terminate their pregnancies legally in other states, as did equal numbers of women from Massachusetts, Michigan, Missouri, Ohio and Texas. More than 5,000 women traveled out-of-state from Connecticut, Florida, Indiana, Maryland and Virginia. In 23 of the states where the abortion laws remained unchanged, all of the women who obtained legal abortions in 1972 had to cross state lines to do so.

Many women traveled great distances to obtain legal abortions. Nearly 40,000 women from the East North Central states (Illinois, Indiana, Michigan, Ohio and Wisconsin) traveled to New York City to obtain legal abortions in 1972. Over 7,000 Floridians also made the trip, as did 2,200 from Tennessee and Georgia, nearly 1,800 from Minnesota, 1,600 from South Carolina, 1,500 from Iowa, 1,300 from Kentucky and 1,100 from Louisiana. Altogether, over 116,000 women crossed state lines in 1972 to obtain abortions in New York City.

Did This Long-Distance Travel Have Any Effects Aside from Inconvenience and Cost?

Many women in need of abortions and who lived in states where antiabortion laws had not been reformed sought the assistance of referral agencies to arrange for abortions in other states. While many were assisted by reputable agencies, thousands fell prey to unscrupulous profiteers. Several of these agencies ultimately were prosecuted and closed down by the attorney general of New York for charging excessive prices and illegally engaging in fee-splitting.

For women who did not go through referral agencies, making the long-distance arrangements often resulted in a delay. The farther a women had to travel, the greater the delay. This delay can be seen in data compiled by the New York City Department of Health on women who obtained abortions as private patients in New York City in 1972. For New York City residents, the average gestational age was 9.4 weeks of pregnancy. Women who lived in states that were not contiguous to New York obtained abortions, on the average, one and one-half weeks later, at 10.6 weeks. Nearly 90 percent of New York City residents who obtained abortions in New York City in 1972 did so before the 13th week of gestation; only 77 percent of the women from states that are not contiguous to New York were able to have abortions before the 13th week.

Travel to a distant state can increase the health risks to the woman by rendering impossible any continuity in her medical care. Most complications that arise from early abortions do not become evident for two-30 days following the procedure. By the time complications arise, an out-of-state woman would be home and unable to receive care from the physician who performed the procedure. As a result of this fragmented medical care, Dr. Jane Hodgson of Washington D.C.'s Preterm Clinic found, "a direct relationship [that] apparently existed between the distance traveled by the patient, delay in medical care and the seriousness of the complication."

S.J. Res. 110: A Giant Step Backward?

Supporters of S.J. Res. 110 contend that the proposed amendment to the Constitution simply would return the legal status of abortion to that which existed prior to the 1973 Supreme Court decisions and once again allow each state independently to determine its policy on abortion. In fact, S.J. Res. 110 would do much more. It would give Congress a power to restrict abortion that it never had. States would be free to enact only legislation more restrictive than federal law. Rather than freeing federal and state legislatures from the long divisive battles over the abortion issue, S.J. Res. 110 would guarantee at least an annual battle in every legislative body in the nation.

While the specific results of passage of S.J. Res. 110 are uncertain, the general parameters can be predicted. Congress would likely pass legislation severely restricting abortion. Although some states would adopt this federal policy, others undoubtedly would enact laws even more restrictive. Women from these states would once again travel, often at great risk and expense, to obtain needed abortions. Others, unable to arrange or afford travel, would resort, as they did prior to 1973, to dangerous clandestine procedures. Whether legal or illegal, abortions would continue to occur.

Who Has Majority Support?

Although abortion advocates are quick to claim that the American public supports legal abortion, sometimes adding "under all or some circumstances" if they're inclined to accuracy, they never explain exactly what those circumstances are. But when pollsters probe the public on this question they discover that only a small percentage believes abortion should be legal under all circumstances.

And that translates into minimal support for the 1973 Supreme Court decisions allowing any woman to have an abortion "in light of all factors—physical, emotional, psychological, familial, and the woman's age."

In 1975, 1977, 1979, and 1980 the Gallup Poll asked a representative sample of American adults if they think abortion should be "legal under all circumstances," "legal only under certain circumstances," or "illegal under all circumstances." The results have been very consistent—and revealing.

Twenty-one to 25 percent believes abortion should be legal under all circumstances. Fifty-three to 55 percent believes abortion should be legal only under certain circumstances, and 18 to 22 percent believes abortion should be illegal under all circumstances. Less than five percent has no opinion on the issue.

Since it is clear that less than half of the population either strongly supports or strongly opposes the Supreme Court abortion decisions, the key to the abortion controversy is under what circumstances the middle 53 to 55 percent supports legal abortions.

A clear majority of that group supports the position of the National Right to Life Committee: that abortion should be legally available for those cases where the mother's life is endangered by the pregnancy. Seventy-seven to 78 percent would allow abortions in life-threatening situations during the first trimester of pregnancy, 64 to 66 percent during the second trimester, and 59 to 60 percent during the third trimester.

A majority also believes abortion should be legal in cases of rape or incest (59 to 65 percent) or when the mother would suffer "severe physical health damage" (52 to 54 percent). But even in these "hard cases," majority support applies only to the first trimester.

The trend among certain members of the medical profession is to use abortion as the "treatment" for those children whose handicaps are discovered while they are still in the womb. But the majority of the American public does not believe abortions should be allowed in those cases. Paradoxically, support for such "eugenic" abortions declines as the pregnancy progresses even though most fetal handicaps cannot as yet be detected until late in the second trimester.

But the circumstances under which a majority of Americans believes abortion should be legally available make up only a tiny part of the over one-and-one-half million abortions done annually in the United States.

When abortion advocates claim that the majority of the public supports legal abortion, the biggest block of support comes from those who believe abortion should be legal when the mother's life is threatened, a position, as already mentioned, which includes all members and supporters of the NRLC.

A more accurate reading of the polls, however, clearly illustrates that the 18 to 22 percent who don't believe any abortions should be legal plus the 53 to 55 percent who believe abortions should be legal only in a few rare situations adds up to the fact that an overwhelming 71 to 77 percent of the American public disapproves of the Supreme Court decisions legalizing abortion on demand.

Gallup Polls 1975 - 1980

"Do you think abortions should be legal under any circumstances, legal under only certain circumstances, or illegal under all circumstances?"

	1980	1979	1977	1975
Legal under all circumstances	25%	22%	22%	21%
Legal only under certain circumstances	53%	54%	55%	54%
Illegal under all circumstances	18%	19%	19%	22%
No opinion	3%	4%	5%	4%

Asked of the middle 53 to 55 percent, "Now, thinking about the first three months of pregnancy (second three months, and last three months), under which of these circumstances do you think abortions should be legal when the woman's life is endangered, when the woman's mental health is endangered, when the pregnancy is a result of rape or incest, when there is a chance the baby will be born deformed, when the woman may suffer severe physical health damage, if the family cannot afford to have the child?"

	1979			1977		
	1st trimester	2nd trimester	3rd trimester	1st trimester	2nd trimester	3rd trimester
Life endangered	78%	66%	59%	77%	64%	60%
Physical health endangered	52%	46%	33%	54%	46%	34%
Mental health endangered	42%	31%	22%	42%	31%	24%
Baby deformed	44%	37%	28%	45%	39%	28%
Rape or incest	59%	32%	19%	65%	38%	24%
Can't afford child	15%	6%	4%	12%	9%	6%
No opinion	9%	9%	21%	2%	9%	20%

Occasional Essay: Jewish perspective on prenatal diagnosis and selective abortion of affected fetuses: including some comparisons with prevailing Catholic beliefs *

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(Running Head: Selective Abortion of Affected Fetuses)

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ABSTRACT

Prenatal diagnosis and selective abortion of affected fetuses are controversial subjects for many individuals. Much of the controversy centers around religious beliefs. We present here prevailing Jewish and Catholic beliefs concerning these two subjects. We hope to resolve some of the controversy and emphasize the fact that patients often make decisions based on their religious persuasion.

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*Presented at the 1981 Sunstone Theological Symposium, 29 August 1981, University of Utah

PREFACE

The following article appeared in the DESERET NEWS, Salt Lake City, 13 March 1981:

Rome Decries Abortion

VATICAN CITY - The Roman Catholic Church condemned the abortion of unborn babies showing malformations and deficiencies as pseudo-humanistic and a breach of medical ethics. "Science and medicine have allowed us today to discover in the fetus some defects which could give rise to future malformations and deficiencies. The impossibility at present of providing a remedy for them by medical means has led some to propose and even practice the suppression of the fetus. This conduct springs from an attitude of pseudo-humanism which compromises the ethical order and objective values and must be rejected by upright consciences, "the Vatican said in a document for the International Year of Disabled Persons. This document reflecting Pope John Paul's views about the sanctity of human life, said the quality of a society and civilization would be measured by the respect shown to the weakest of its members.

INTRODUCTION

Recent advances in prenatal diagnosis have generated a moral crisis for many people. Important technological applications have created options which only a few decades ago would have been regarded as science fiction. While physicians now have the ability to diagnose and exercise _in utero_ control over some diseases, unfortunately they are unable to treat all severe birth defects which can be diagnosed prenatally at this time. Scientists, humanists and lay persons are becoming increasingly aware of the religious, ethical and moral issues which have arisen from medicine's enhanced ability to control life processes or, in some cases, terminate pregnancies.

A significant body of literature reflecting Jewish scholarship in the field of bioethics has been published. Since Judaism is not homogeneous, various approaches and interpretations of Jewish law (halakhah) have developed. We will attempt to include here views of the two liberal positions, including Reform Judaism which does not accept the binding authority of the halakhah, and Conservative Judaism which accepts the authority of the halakhah but views it as the product of a dynamic evolutionary process; i.e. Conservative Judaism tends toward a liberal construction of the law. We shall also discuss the views of Orthodox Judaism which incline toward a literal and strictly constructionist approach. In so doing we hope to convey a conspectus of Jewish attitudes towards prenatal diagnosis and selective abortion of defective fetuses. Before discussing these topics we will provide some background material concerning Jewish law, Jewish beliefs concerning ensoulment (entry of the soul into the fetus), and therapeutic abortion. In several instances comparison with prevailing Catholic attitudes will be made.

BACKGROUND

The basis of Jewish law is the Torah, or "teaching". This is best understood as having two parts. The first is the written Torah which consists of the five Books of Moses or Pentateuch, the first five books of the Bible. The second part of the Torah is called the Oral Torah which consists of the accompanying expositions and interpretations of the written Torah which are contained in the Talmud and later rabbinic literature. The Talmud, compiled and edited by the fifth century A.D., remains the basic source of all legal decisions affecting a Jew's existence. Traditionalists accept the view that the Talmud was communicated to Moses verbally as a supplement to the written Torah. Liberal interpreters view the Talmud as the product of the post-Biblical experience of rabbinic exposition in applying the principles of the written Torah to a changing community.

In a sense, the Written Torah can be compared to the Constitution of the United States. It is the skeleton of the body of Jewish law as the Constitution is the skeleton of the body of American civil law. And, just as the huge number of decisions of the United States courts (case law) put flesh on the skeleton of the Constitution, so do Talmudic and later rabbinic law put flesh on the skeleton of the Written Torah.

In Jewish law the fetus is considered to be part of its mother rather than an independent entity, but this designation says nothing about the right of abortion. Somewhat more relevant is the factor of "doubtful viability" associated with the embryo. The fetus is not considered to be a viable, living human being until thirty days after its birth, unless a full-term pregnancy is definitely known to have been completed. Germane as this information is to the question of abortion, it is hardly sufficient to determine the morality of such action. It merely defines the legal status of the fetus and tells us that according to Jewish (and Roman) law, the fetus has no legal status of its own.

More relevant to our discussion concerning the morality of abortion is the Jewish legal attitude to feticide as compared to homicide or infanticide. The law of homicide in the Torah, in one of its several formulations (Exodus 21:12) reads, "He who smites a man..." According to the Talmud citing another text (Lev. 24:17), the passage from Exodus includes any human person including a one day old child (with the presumption in favor of a full-term pregnancy); but is taken to exclude the fetus because the fetus is not a person until it is born.

Exodus 21:22 provides another scriptural text for denying capital crime status to feticide in Jewish law:

> If men strive (fight), and wound a pregnant woman so that her fruit be expelled, but no harm befall (her), then shall he be fined as her husband shall assess, and the matter placed before the judges. But if harm befall (her, i.e., she is killed), then shalt thou give life for life.

While all rabbis, past and present, treat abortion in a most serious manner, the halakhah tells us that it remains a noncapital crime.

A distinct difference between the Catholic and Jewish attitudes concerning abortion is derived from Exodus 21:22. To begin with, this very important passage has an alternate version in the Septuagint, the Greek translation of the Bible produced in Alexandria in the third pre-Christian century. A one word mistake in the translation of the text yields an entirely different statute on abortion. The word in question is ason, which the Talmud renders as harm, hence: "if (there be) no harm (i.e., death, to the mother), he shall be fined..." The Greek translation renders the word ason as form, yielding something like: "if (there be) no form (yet, to the fetus), he shall be fined... But if (there be) form, then shalt thou give life for life". The "life for life" clause was thus applied to the mother, and a distinction was made between a fetus not yet "formed" and one already "formed". For aborting the latter, the text so rendered prescribes the death penalty. The Didache, a handbook of basic Christianity for the instruction of converts from paganism, follows this Alexandrian teaching and specifies abortion as a capital crime.

The prevailing rabbinic outlook states that the time of ensoulment and the nature of that soul belong to those "secrets of God". They have no bearing on the practical/legal issues of feticide versus homicide. Clearly, some kind of "life" other than human personhood is presupposed for the fetus. The teaching of the Pythagorean Greeks that the soul enters the body at conception prevailed in Christianity by way of the third centruy Church Father Tertullian, and was confirmed by St. Gregory of Nyssa in the fourth century. In the fifth century, Augustine introduced the distinction, based on the Septuagint, where by only the killing of a "formed" fetus is homicide and, consequently, that only such a fetus can be said to have a soul.

Although St. Basil (d. 329) had condemned abortion at any stage, the Justinian Code in the sixth century exempted abortions before forty days from penalty. Gratian's Decretum of 1140, a ruling by Pope Innocent III (c. 1216), and the Decretalia of Pope Gregory IX (c. 1241) all reaffirmed the difference between "animated" (ensouled) fetuses and those younger than that. The bull Effraenatum of Pope Sixtus V in 1588 did away with the forty day rule and declared abortion murder at any stage on penalty of excommunication, even for those who counseled it. His decree was rescinded less than three years later by Pope Gregory XIV. The relaxation of penalties lasted until 1869, when Pope Pius IX reinstituted the doctrine and the sanctions of Sixtus V. This decree of 1869, further affirmed in the current code of Canon Law which came into force in 1918, is now the reigning doctrine of Catholicism. The original Pythagorean view and the teaching of Effraenatum have thus prevailed.

More important than the time of ensoulment is another belief, namely that the soul is in need of baptism for its salvation - which follows, in turn, from the doctrine of original sin. In his esteemed treatise, De Fide, written in the sixth century, St. Fulgentius says:

> It is to be believed beyond doubt that not only men who are come to the use of reason, but infants whether they die in their mother's womb, or after they are born, without baptism in the name of the Father, Son, and Holy Ghost, are punished with everlasting punishment in eternal fire, because though they have no actual sin of their own, yet they carry along with them the condemnation of original sin from their first conception and birth.

Augustine had likewise taught that the embryo is included among those whose souls were condemned to eternal perdition if they died unbaptized. Aquinas later suggested the possibility of salvation for an infant who did not survive until birth, but the original teaching continued its hold. The result was that abortion came to be considered worse than murder. The death of a baptized mother is only the beginning of an eternity of salvation, while the death of an unbaptized infant is the beginning of an eternity of perdition.

All of this represents a serious concern for the immortality of the soul of the fetus. Granted its entry at any given time, the concern now is not only that it not be deprived of life in this world but that it not be denied eternal salvation in the next. While it must be said that Catholicism's position on abortion has contributed to the moral consciousness of western civilization in this regard and has succeeded in sensitizing humanity to a greater reverence for life, it is undoubtedly true that the Catholic position on the issue is the product of the acceptance of theological postulates which Judaism cannot share, including the dogma of original sin and the need to be baptized to achieve eternal salvation.

A JEWISH PERSPECTIVE

All Jews are admonished not to treat abortion lightly. Abortion is a heavy responsibility for the one who asks for it and the individual who is asked. Except when extenuating circumstances exist, abortion is prohibited by Jewish law despite the fact that feticide is neither murder nor a capital offense. However, there are certain maternal or fetal circumstances permitting termination of pregnancy. Jewish legal authorities differ on the nature of those indications.

The main talmudic source for this question is as follows:

> "If a woman is having difficulty giving birth, it is permitted to dismember the child inside her womb and take it out limb by limb because her life takes precedence. If the greater part of the child has come out it must not be touched, because one life must not be taken to save another. (Ahalot 7:6)"

Rashi, a renowned Hebrew sage of the Middle Ages, comments on the above passage:

> "For as long as it did not come out into the world it is not called a living thing and it is permissible to take its life in order to save another. Once the head has come forth it may not be harmed because it is considered born, and one life may not be taken to save another".

Thus, according to Rashi, the reason that it is permitted to take the life of the unborn child is that the fetus is not considered a living thing and, hence, taking its life cannot be called murder.

From Moses Maimonides it appears that the reason the "life" of the unborn child may be taken when it endangers the life of the mother is based on the law of the "pursuer". In his code Maimonides says:

"This is, moreover, a negative commandment, that we have no pity on the life of a pursuer. Consequently the sages have ruled that if a woman with child is having difficulties in giving birth, the child inside her may be taken out, either by drugs or by surgery, because it is regarded as one pursuing her and trying to kill her. But once its head has appeared, it must not be touched, for we may not set aside one human life to save another human life, and what is happening is the course of nature (code of Maimonides, Murder and the Preservation of Life, 1:9)."

There is, then a clear distinction between the reasoning of Rashi and that of Maimonides. According to Rashi, the embryo is not considered a living being and therefore the life of the mother takes precedence. According to Maimonides, the life of the mother takes precedence because the fetus is in the position of "pursuer". From this difference in interpretation, different legal decisions have arisen. According to Maimonides, we should permit abortion only where there is clear danger to the life of the mother. According to Rashi, there might be other adequate reasons beside a threat to the mother's life.

When there is clear, life-threatening danger posed to the mother by continuation of the pregnancy, Jewish law is clear and unequivocal in stating that a therapeutic abortion not only may be performed but must be performed. The Talmud requires a therapeutic abortion to save the mother's life because she is considered to be a person while the fetus, up until the time of the birth, is not. In circumstances where the pregnancy is detrimental to the mother's health, although not life threatening, many halakhic authorities argue that there is justification for permitting termination of the pregnancy. Such circumstances include mental health problems since these have been definitely equated with physical health risk; thus a woman who is in danger of losing her mental health unless the pregnancy is interrupted would qualify according to this view. Most Reform and Conservative rabbis and some Orthodox rabbis would agree to this. (Bleich 1968, Rosner 1968, Klein 1979). If there is a substantial risk that the fetus would be born with a deformity that would cause it to suffer severely, some authorities have said that it is permitted to terminate the pregnancy within the first three months (Klein 1979). According to this view, in circumstances where it has been proven conclusively (by prenatal diagnosis or amniocentesis) that the fetus will be afflicted with a disorder such as Tay-Sachs disease, it is permitted to perform an abortion up to the 24th week of pregnancy (Rosner 1976, Steinberg 1980).

It should be noted that the opinions expressed here are controversial. We think that the majority of Reform and Conservative rabbis and many Orthodox rabbis in the United States would support the position for prenatal testing and abortion of defective fetuses depending on the degree of affliction in the fetus and the mother's physical and mental health. In Jewish families,.therefore, we think that such decisions should be made by the woman and her husband with input from her rabbi and doctor.

We realize that abortion of defective fetuses is an unfortunate but necessary option for some families. The ultimate goal of much research in birth defects is primary prevention which will obviate the need for selective abortion. However, until the time when all severe birth defect syndromes can be prevented, such options must be made available to Jewish families who want them.

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MEMORANDUM IN OPPOSITION TO S. J. RES. 110

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This memorandum is submitted in opposition to S. J. Res. 110.

S. J. Res. 110 was proposed as an amendment to the United States Constitution by Senator Orrin G. Hatch on September 21, 1981 (Congressional Record - Senate, S10194-98).

The substantive portion of the proposed amendment, as reported by the Senate Subcommittee on the Constitution, provides:

> A right to abortion is not secured by this Constitution. The Congress and the several States shall have concurrent power to restrict and prohibit abortion: Provided, that a provision of a law of a State which is more restrictive than a conflicting provision of a law of Congress shall govern.

It is Senator Hatch's intent that the amendment both "overturn the infamous decision of the U.S. Supreme Court in Roe v. Wade, 410 U.S. 113 (1973)," (Congressional Record - Senate, S10194, 9/21/81), with its "virtually unrestricted right" to abortion (id. at S10195), and negate the judicial "progeny" of Wade. (Id. at S10196).

Senator Hatch is cognizant that his amendment neither recognizes that abortion involves the taking of a human life (id. at S10196), nor creates any duty to protect the unborn. (Id. at S10195). Thus the amendment is not prohibitory but permissive. The factual humanity, the Fourteenth and Fifth Amendment personhood of the unborn (vis a vis the Due Process and Equal Protection clauses), and their rights to life and the law's protection of life are entirely absent from S. J. Res. 110. Rather the intent is to create a "right to legislate with respect to abortion" including the discretion to enact legislation totally denying any protection to unborn children. (Id. S10197).

The amendment is not a Human Life Amendment; it is not a Right to Life Amendment. It is a Legislator's Rights Amendment.

I appreciate the good will and the genuine pro-life concerns that have motivated the amendment. I oppose it nevertheless.

The amendment institutionalizes in our fundamental law the notion promulgated by the Court in Wade that some human beings may be categorized as rightless things. (See I, infra.) Were it otherwise, S. J. Res. 110 would be prohibitory not permissive. Fundamental rights would not be put at the disposition of legislatures.

Because the amendment makes things out of people, there is the gravest danger that judicial interpretation will nullify any legislation enacted pursuant to it by subordinating the legislation to the "right to health." (II.A. infra). Further S. J. Res. 110 will not confer on legislatures any powers they do not already have to restrict fetal experimentation or the medical research use of fetuses. (II.B. infra). The amendment will, however, exacerbate the danger that others whose lives are also deemed not meaningful will also be depersonalized. (II.C. infra). Finally if the unborn are things under the Constitution, the validity of any legislation declaring them persons (a Human Life Bill) would be seriously in doubt (II.D. infra).

I. The Status of the Unborn Under S. J. Res. 110: Persons or Things?

Proponents of S. J. Res. 110 disagree on the status of the unborn under the amendment. Their positions range from claims that the amendment affirms the personhood of the unborn to assertions that the unborn will at least be restored to the "ambiguous" status they occupied prior to Roe v. Wade. Given that ambiguity (the argument continues) prolife proponents will be free to relitigate the rights of the unborn with a view to obtaining a judicial declaration of their humanity-cum-personhood.

It is submitted that each of these positions is wrong. As a matter of law, S. J. Res. 110 relegates the unborn to the status of things. "Property does not have rights. People have rights." Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972). S. J. Res. 110 recognizes no rights of the unborn. They are not people under the amendment; they are things. This conclusion is inevitable for a number of reasons:

1. The expressed intent of the sponsor is "to 'deconstitutionalize' the abortion issue." (Congressional Record - Senate, S10196, 9/21/81). The abortion issue is multi-faceted. There is more to it than a woman's "right" to abortion. The unborns' factual humanbeingness, their Fourteenth Amendment personhood and their rights to life and the law's protection of life are also constituents of the issue. To deconstitutionalize the issue is to deconstitutionalize the whole issue--to deny to the unborn any constitutional status and all constitutional rights--to depersonalize and dehumanize them--to ratify and institutionalize in our fundamental law their status under Wade as rightless non-persons.

If S. J. Res. 110 were to become the law of the land, it would, in and of and by itself, constitute the irrefutable rebuttal of any future claims that the Supreme Court erred in *Wade* when it proclaimed the unborn less than persons and only potentially human. One cannot claim the constitutional status of persons for entities which have been denied that status by an amendment to the Constitution.

In terms of deconstitutionalizing the unborn, *Wade* and S. J. Res. 110 are indistinguishable.

2. *The amendment leaves key portions of Wade intact*. There has been widespread misunderstanding of the substantive structure of the Supreme Court's opinion in *Wade*. Apparently some have approached, read, and subconciously reordered the opinion according to their preconceived notions of how the Court ought to have proceeded. For this reason they have failed to perceive how the Court actually did proceed and have concluded, erroneously, that S. J. Res. 110 would reverse all of *Wade*.

The Court agreed that if the Fourteenth Amendment personhood of the unborn child were established, "the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the amendment." 410 U.S. at 156-57. Hence the approach of the Court should have been to decide: (a) whether the unborn child, as a matter of fact, is a live human being, (b) whether all live human beings are "persons" within the Fourteenth Amendment, and (c) whether, in the light of the answers to (a) and (b), the state has a compelling interest in the protection of the unborn child, or to put it another way, whether there are any other interests of the state which would justify denying to the unborn child the law's protection of his life. See Byrn, *An American Tragedy, The Supreme Court Decision on Abortion*, 41 Fordham Law Review, 807, 813 (1973).

Had the Court proceeded in this fashion and concluded that *because* the unborn are neither persons nor human, the state has no compelling interest in their lives in the face of a woman's claim of a right of privacy to abort, then arguably S. J. Res. 110, by derogating the abortion right, would cast doubt upon the Court's rationale for creating the right. At least a case could be made that if S. J. Res. 110 repudiates the right to abort, *a fortiori* it undermines the underpinnings of the right (the nonhumanity/nonpersonhood of the unborn).

However, that was not the way the Court proceeded, nor could it have. *Wade* is result-oriented. The Court wanted to create a right to abort. But that result could not easily have been reached had the Court properly structured its opinion. After all, the unborn are in fact live human beings. The Fourteenth Amendment guarantees to persons of Due Process and Equal Protection cannot be invidiously class-selective; they must comprehend all live human beings. Ergo, the state has a compelling interest in protecting the lives of the unborn. The Court would have had a difficult time creating a right to abort had it conducted the inquiry in proper order.

Thus, in order for the Court to reach the result it desired, it had to reverse the order of inquiry. It had to, and did, decide at the threshold (before it decided anything else) that there is a fundamental "right of privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. Having established the fundamental right, the Court could then shift to the state the heavy burden of demonstrating to the Court's satisfaction a compelling state interest in unborn children. *Id.* at 155. Only *after* discovering that a fundamental right to abort exists did the Court examine the state's interests. And with the onus shifted, the result was easier to reach. Presumption of law and fact were erected against the child, and the Court found that the state had failed to demonstrate that the unborn are persons, id. at 156-59, or human beings, id. at 159-61. Even the statement that if the Fourteenth Amendment personhood of the unborn child were established "the fetus' right to life is then guaranteed specifically by the amendment," occurs in the opinion after the right to abort has been espoused by the Court and in the course of examining whether the state had demonstrated a compelling interest in the lives of the unborn by proving their personhood.

In short, the Court found a right to abort before it even addressed the issue of the humanity/personhood of the child. The former is not dependent on the latter. The latter only determines to what extent the state may infringe the former. Expunging the former does not expunge the latter.

Nor can it be claimed that the legislative empowerment clause of S. J. Res. 110 restores the unborn to human/person status. Once the fundamental right to abort is expunged, it is no longer necessary to show a compelling state interest to support protection of the unborn.* To put it another way, the Congress and the states would be empowered to afford the unborn the same protection legislatures now commonly give to certain endangered species. But legislative protection of snail darters does not make snail darters persons.

In sum, the substantive holdings in Wade may be reduced to three:

1. There is a fundamental right of privacy, which

2. Is broad enough to include the abortion decision; and

3. Since the unborn are neither persons nor humans, protection of the unborn is not an interest of the state sufficiently compelling to justify infringement of the right to abort.**

S. J. Res. 110 may expunge "2." It leaves "1." and "3." intact.

3. The amendment would constitutionalize legislative discretion to exclude some or all of the unborn from the law's protection of life when such an exclusion would be constitutionally impermissible with respect to every other class of human beings.

I offer this scenario:

-- S. J. Res. 110 has been ratified.

-- Prior to any Congressional action, New York State enacts an abortion statute incriminating all abortions except those necessary to prevent the pregnant woman's death.***

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* But see the discussion of the woman's right to health in II.A. infra.

** I omit for the moment discussion of that part of Wade which finds a compelling state interest after viability. As Professor John T. Noonan pointed out in testimony before the Senate Subcommittee on the Constitution, on October 5, 1981, that particular interest of the state was negated by making it subject to the health of the woman. The exception will become significant in II.A. infra.

*** That such an exception is justified by the doctrine of necessity and is not a denial of Equal Protection, see Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Fordham Law Review, 807, 853-54 (1973).

-- Congress passes and the President signs legislation incriminating all abortions except (a) those necessary to prevent the death of the pregnant woman or (b) when the fetus has been diagnosed as defective.

-- A newly-elected legislature amends the New York statute to conform to the federal law.

-- A class action is commenced in New York, in accordance with precedented procedures (see *Byrn* v. *N.Y.C. Health and Hospitals Corp.*, 38 App. Div. 2d 316, 329;N.Y.S. 2d 390 (1972)) wherein a guardian, appointed for all defective fetuses scheduled or to be scheduled for abortion in public hospitals of the City of New York, seeks (a) to enjoin the abortions, and (b) a declaration of the unconstitutionality of the fetal defect amendment to the New York statute on the ground that it denies to the defective unborn the Equal Protection of the Laws.*

-- The Court dismisses the complaint because under S. J. Res. 110, the matter is one of legislative discretion and the unborn are not Fourteenth Amendment persons.

-- The Court would be absolutely correct. The intent of S. J. Res. 110 is to establish a "right to legislate with respect to abortion" (Congressional Record - Senate, S10197, 9/21/81), and the New York State legislature merely exercised that right. Of course, it would possess no such unfettered "right to legislate" were the unborn Fourteenth Amendment persons.** Manifestly, the existence of the legislative right denies the existence of the child's right.

The debasement of the unborn is even more vividly apparent when S. J. Res. 110 is viewed in the light of the criticisms of *Wade* by legal scholars and the tenor of the Supreme Court dissents in *Wade*.

Critics of *Wade* fall into two groups. The first group condemns *Wade* for its denial of personhood to the unborn. The second group believes that lawmaking on "moral" or "social" issues such as abortion is a purely legislative function with which the courts ought not interfere. (See the authors cited in J. T. Noonan, *A Private Choice*, 29-32 (1979)). Thus, the second group objects to the Supreme Court's creation of a fundamental right to abort (because the right restricts legislative discretion), but supports the Court's declaration that the unborn are nonpersons (because personhood signifies fundamental rights and fundamental rights restrict legislative discretion).

In short, the second group is pro-legislature, not pro-life. These critics of *Wade* believe that legislatures ought to be able to enact any sort of abortion laws they want. Just as these scholars now condemn the Supreme Court for creating a right to abort as a means of striking down a restrictive abortion statute, so too would they oppose a Supreme Court decision recognizing the unborn's right to live as a basis for invalidating a permissive abortion law.

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* Under New York law if an amendment to a statute is unconstitutional, the statute remains in force as though the amendment had never been enacted. 1 McKinney's Consolidated Laws of New York, Statutes, sect. 377.

** Obviously an amendment removing deformed or defective blacks, Catholics or any other class from the aegis of New York's homicide statutes would be unconstitutional under the Fourteenth Amendment guarantee of Equal Protection of the laws.

The dissents in Wade are also pro-legislature. They contain no reference to the rights of the unborn. They rely, instead, on the prerogatives of legislatures.

Against this dual background--the pro-legislature dissents in Wade and the pro-legislature criticisms of Wade by influential legal scholars--the pro-legislature thrust of S. J. Res. 110 can hardly be said to acknowledge, even implicitly, the personhood and rights of the unborn. To the contrary, as a pro-legislature response to Wade, S. J. Res. 110 can be said to ratify the non-personhood and rightlessness of the unborn.

Admittedly, S. J. Res. 110 would raise the post-Wade status of the unborn from things that a legislature may not protect to things that are legislatively protectable. But the unborn would remain things--like whales or landmark buildings (let's protect them!) or like a teeming, pesky species (let's not!), depending upon how legislative majorities choose to treat them.

Professor John Noonan has ably pinpointed the underlying jurisprudence of the kind of majoritarianism espoused by S. J. Res. 110: Human beings may be treated as rightless nonpersons [things] if the empowered lawmaker, whether court or legislature, so chooses.* (J. T. Noonan, A Private Choice, 13-19 (1979)). I agree entirely with Professor Noonan's condemnation of this jurisprudence. (Id. at 18):

> But all rights in our constitutional jurisprudence are premised on humanity. Your rights flow from your human character. None of them have security if it rests with a group of nine men, or a majority of them, to define you out of the human race. No discrete and insular minority is safe if all its liberties can be removed by defining it as subhuman. If the legal order is a universe which can be developed without reference to the natural order, only the will of the makers of the legal order controls the recognition of legal existence.

Majoritarianism--whether legislative or judicial--is always objectionable when the majority is empowered to dispense with fundamental rights. "A government...which held the lives...of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all, but a despotism. It is true it is a despotism of the many, if you choose to call it so, but it is none the less a despotism." Loan Association v. Topeka, 87 U.S. (20 Wall) 655, 662 (1875). Accordingly, "One's right to life...and other fundamental rights may not be submitted to vote; they depend on the outcome of no election." West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943). S. J. Res. 110 would make the right to life of the unborn forever dependent on the outcome of elections.

II. The Effects of Constitutionalizing the Status of the Unborn as Things

A. Restrictive legislation enacted pursuant to S. J. Res. 110 may well be held unconstitutional as an infringement of a woman's "right to health."

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* I do not mean to convey that Professor Noonan opposes S. J. Res. 110. He supports it.

1. The right to health. There has been a natural tendency to focus on the "right to abortion" in Wade. Its enormity draws undivided attention. As a result, the fact that Wade recognized another fundamental right has gone practically unnoticed. This is the right to health.*

We are told in Wade, "With respect to the state's important and legitimate interest in potential life the 'compelling' point is at viability. * * * If the state is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother." 410 U.S. at 163. (Emphasis added.) Even though the state's interest in the post-viable unborn is compelling, it is subject to the woman's right to preserve her health. Note: The right at stake is not the right to abortion (addressed by S. J. Res. 110), but the right to health (not addressed by S. J. Res. 110). Note: The right is even "more" fundamental than the right to abortion. The woman's right to abortion recedes after viability. The woman's right to health exists throughout pregnancy. Indeed, it exists throughout life.

The idea of a fundamental right to preserve one's health did not spring full-grown from the brows of the Justices in Wade. It is amply precedented. Neither the fundamental right of parents to choose how to raise their children nor the fundamental right of free religious exercise overbalances the child's right to preservation of health. Prince v. Mass., 321 U.S. 158, 166-67 (1944). The power of the state to require vaccinations to prevent the spread of communicable disease (a constituent of the police power) is subordinate to the fundamental right of an individual who is seriously allergic to the vaccine, to preserve his health by rejecting the vaccination. Jacobson v. Mass., 197 U.S. 11, 39 (1905). Several courts have cited Wade, outside the abortion context, for the proposition that the right of privacy includes the right to chart the course of one's own therapeutic medical treatment free of governmental interference. Whether the fundamental, constitutional right to health exists as a discrete sub-species of Due Process or as a component of the Right of Privacy, there is no question but that it does exist and that its existence was reaffirmed in Wade.

2. The right to health vs. the right to legislate. The result of this confrontation is foreordained. In upholding the validity of a state compulsory vaccination statute, the Supreme Court spoke to the situation of the individual whose health might be adversely affected by enforcement of the statute. In Jacobson v. Mass., 197 U.S. 11, 38-39 (1905), the Court opined:

> It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body, would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. "All laws," this court has said,

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* I use the right to health here in the same short hand way that S. J. Res. 110 refers to the right to abortion. It is to be noted that the funding cases are not relevant here. Harris v. McRae, 100 S. Ct. 2671 (1980); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977), and Beal v. Doe, 432 U.S. 438 (1977) were not directly concerned with the right to abortion or the right to health. The issue was not the existence of these rights but whether the government must fund and facilitate their exercise.

> "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of that character. The reason of the law in such cases should prevail over its letter." United States v. Kirby. 8 Wall. 482; Lau Ow Bew v. United States, 144 U.S. 47, 58. Until otherwise informed by the highest court of Massachusetts we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, by reason of his then condition, would seriously impair his health or probably cause his death.

At the very least, a health exception will be read into any legislation--state or federal--which is enacted pursuant to S. J. Res. 110. More likely the legislation will be declared unconstitutional as an impermissible infringement of a woman's right to health.

I agree with Professor John T. Noonan that "There is grave danger that any exception to save life or to prevent death will be interpreted judically to permit abortion for health reasons; and abortion for health reasons is easily turned into the equivalent of abortion on demand." (Testimony before the Senate Subcommittee on the Constitution, 10/5/81.) Obviously careful draftsmanship is required. I suggest, however, that no amount of care will obviate the danger if the abortion legislation is enacted pursuant to S. J. Res. 110. It simply makes no sense to prefer the continued existence of things (which unborn children are under S. J. Res. 110) to the health of women, no matter how broadly health be defined. It would not be--in the words of the Jacobson court--"a sensible construction," or, if it were the only construction available, the statute would be unconstitutional.

The only assurance of sensible construction is to confront a claim to health with a claim to life. The only way to do this is to restore the constitutional personhood of the unborn child.

3. The right to health vs. the "plenary" power of legislatures. It is fair to ask how a statute enacted pursuant to S. J. Res. 110 could be unconstitutional when S. J. Res. 110--which would itself be part of the Constitution--purports to vest in participants in the legislative process the "plenary" power to legislate as they will. One must not be deceived by the adjective "plenary." It does not mean arbitrary. Both the sponsor of the amendment (Congressional Record - Senate, S10197, 9/21/81) and its proponents (e.g., Testimony of Prof. Victor Rosenblum before the Senate Subcommittee on the Constitution, 11/16/81) recognize that the "plenary" power is restricted by other provisions of the Constitution. One of those other provisions is the guarantee of the right to health.

It is fair to ask in rebuttal how the right to health can limit the amendment when the sponsor believes that Congress and the states "could act under the proposed amendment to totally prohibit abortion." (Congressional Record - Senate, S10196, 9/21/81).

The point is telling on its face, but not so on further inquiry. There are several answers:

(a) The sponsor might have been wrong in his interpretation of the legal effect of the amendment. This was clearly the case when Senator Hatch opined that the amendment would permit legislatures to "place limitations upon the experimental and medical research use of fetuses" (beyond that which they may constitutionally do today). *Id.* at S10197. (See "C." *infra*).

(b) The intent of the sponsor does not necessarily represent the interest of Congress. Obviously the amendment and the sponsor's remarks in the presentation of it were drafted to attract the widest level of support in the Congress which includes the least common denominator of opposition to *Wade*. The least common denominator could well include proponents of a health exception. Statements by sponsors are given weight but they "must be evaluated cautiously" (2A Sutherland's Statutory Construction, Sect. 48.15 at 222 (Sands, ed., 1973)), and legislative intent must be distinguished from the subjective intent of individual legislators. *Id.*, sect. 45.06 at 19.

(c) The sponsor's interpretation of the amendment as creating a comprehensive power and right in legislatures to do what they want about abortion conflicts with his admirably candid admission that legislation under the amendment would be restricted by other portions of the Constitution. Which other portions? The right to health, for instance?

(d) As a matter of legal realism, courts will interpret the amendment as they choose. Such has been the history of the federal courts in the abortion controversy. See Byrn, *Judicial Imperialism*, Human Life Review, Vol. III, No. 4 at 19 (1977). Professor Victor Rosenblum emphasized in his testimony before the Senate Subcommittee on Separation of Powers (6/1/81) how the Court in *Wade* ignored the intent of the sponsors of the Fourteenth Amendment that the amendment be "universal" in its protection and apply to "any human being," to "common humanity," to "every member of the human race." How much easier would it be for a court to ignore the sentiments of the sponsor of S. J. Res. 110 when confronted with a choice between affirming the acknowledged right to health of a pregnant woman and the continued existence of a thing! How easy it would be the Court simply to cite the extract from *Jacobson* v. *Mass.*, which I quoted earlier, and write a health exception into the amendment!

B. *S. J. Res. 110 does not empower Congress or the states to act with respect to fetal experimentation or the medical research use of fetuses.* To the extent that Congress or the states presently lack complete power to bar fetal research and the medical research use of fetuses, S. J. Res. 110 would not supply it. The amendment grants the power to restrict and prohibit abortions. It does not speak to other insults to the integrity of the unborn.

Professor Rosenblum analogizes S. J. Res. 110 to the Thirteenth Amendment and maintains that Congress and the states would be empowered to eradicate the "badges and incidents" of abortion, just as the badges and incidents of slavery may be eradicated legislatively under the Thirteenth Amendment. (Testimony before the Senate Subcommittee on the Constitution, 11/16/81).

But the Thirteenth Amendment is prohibitory; S. J. Res. 110 is permissive. The Thirteenth Amendment condemns slavery; S. J. Res. 110 permits abortion. It is the prohibitory nature of the Thirteenth Amendment which gives to Congress the power to eliminate the badges and incidents of slavery. As the Supreme Court observed in the Civil Rights Cases, 109 U.S. 9, 20 (1883):

> * * *The Thirteenth Amendment may be regarded as nullifying all state laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.* * *

S. J. Res. 110 does not "nullify" abortion; it permits it. It does not have "a reflex character" establishing the personhood and rights of the unborn; its "reflex character" constitutionalizes the nonpersonhood and rightlessness of the unborn. It is not protective of the unborn; it bears no resemblance to the Thirteenth Amendment. S. J. Res. 110 confers a limited right to legislate in the area of abortion. It confers no right to legislate with respect to fetal experimentation or the medical research use of fetuses.

C. The constitutionalization of the unborn as things under S. J. Res. 110 exacerbates the danger that others whose lives are also deemed not to be meaningful will also be depersonalized.

Once one burdensome class of human beings is read out of the Fourteenth Amendment personhood, it becomes easy to extend their fate to other classes. In a decision dealing with the cessation of medical treatment for a comatose patient, a New York court inquired whether the state has an interest in preserving the patient's life. Said the court, "Indeed, with Roe [v. Wade] in mind, it is appropriate to note that the state's interest in preservation of the life of the fetus would appear to be greater than any possible interest the state may have in maintaining the continued life of a terminally ill comatose patient* * *Such claim to personhood [of the patient] is certainly no greater than that of the fetus." Matter of Eichner, 73 A.D.2d 431, 465-66 (1980), affirmed on other grounds, 52 N.Y.2d 363 (1981).

The issue of the cessation of medical treatment for the comatose patient is a complex one. But no involved debate or profound insight is required to perceive that, however they are treated, persons at the end of life ought not be read out of the human race. Yet the New York court did it on the justification that such individuals cannot be persons because fetuses are not.

The New York court relied on Wade. At least as of now Wade still remains controversial. We can challenge it. We can condemn it as the bad law that it is. We can defend other classes against the jurisprudence of Wade by attacking Wade. Were S. J. Res. 110 to become the law of the land, the fetus, as a matter of undeniable constitutional law, would have no claim to personhood. Would not we then suffer an accelerated judicial depersonalization of other classes whose lives are not "meaningful" (to be followed, perhaps by a series of constitutional amendments creating discretion in legislatures to protect or refrain from protecting the defective newborn, the terminally ill and other of the besieged of our species)?*

D. *S. J. Res. 110 would bar a Human Life Bill.* It seems self-evident that an *amendment to the Constitution which* categorizes the unborn as less than persons would bar any congressional legislation declaring them persons.

CONCLUSION

No one questions but that Senator Hatch and the supporters of his amendment genuinely abhor abortion. I suggest, however, that there is no warrant in legal experience to believe that S. J. Res. 110 will accomplish anything except to accelerate disdain for the lives of the unborn (and others). There has *never* been a time in history when compromise on the personhood of a class has led to respect for their personhood. It did not work for American slaves; it did not work for German Jews; it did not work for the unborn in the pre-*Wade* days when "moderate abortion reform" statutes were being enacted. It will *not* work under S. J. Res. 110.

For all the above reasons, I oppose S. J. Res. 110.

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* For a more detailed exposition of the euthanasia aspects of *Wade*, see Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham Law Review 807, 859-61 (1973).

THE BIOGRAPHY OF ABORTION

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INTRODUCTION

In most cases, the same thread weaves through the stories of the women we see. This thread is the fact that no one offered or seemed to care about solutions, other than abortion, that the women could choose when they were faced with problem pregnancies.

Had they been shown "another" way, perhaps today things might be different for them.

At Lifeline we constantly see women who have already had abortions and who tell us that, had they had information about alternatives, they would never have aborted.

Following abortions many women come to our office for pregnancy tests when there is no reason to suspect they are pregnant. They come because they say they "can feel the baby kicking". After talking with the client we find that she has had an abortion and is not fully reconciled to that fact.

CASE HISTORIES

1) Name: C. Age: 15 Status: Single

Became pregnant one year ago. Raped by friend. Rape was not reported. Saline abortion at four months. Crying over the phone because "baby was already moving" at the time of her abortion. After saline injection "My baby kicked for the last time". She was so troubled by it she asked to see her baby. They told her she was foolish but she insisted. It was a boy.

This year circumstances have repeated. At 15 she is pregnant again, raped by same "friend" who forced her again. She is seeking help because she couldn't go through another abortion.

2) Name: V. Age: 34 Status: Divorced

Her statement "No baby could have ever caused the emotional and physical suffering that I have gone through since the abortion." She has been in a mental hospital; has since been divorced and at times contemplated suicide. She attributes most of her problems, including her divorce, to the fact that she had the abortion.

3) Name: S. Age: 28 Status: Married

Approached a Lifeline volunteer after speaking engagement. Her abortion had been performed nine years ago when she was a single college student. She felt that her education was more important than carrying a baby. S. was in counseling for a few years after the abortion. She said she cried every night for seven years and many times contemplated suicide. Now as a married women she still has a difficult time accepting the fact that she denied life to her first baby.

4) Name: L. Age: 25 Status: Married

Hasn't informed husband of abortion that she had several years ago before she met and married him. They want children badly but she has not been able to conceive.

Because she feels her inability to become pregnant stems from her abortion, she is experiencing great guilt and was in need of reconciliation.

5) Name: R. Age: 40 Status: Married

Wife had prominent new position and did not want to be tied down with baby. He agreed because they had so much (home, property, kennels--"The American Dream") and felt that a baby would be too time consuming and besides they already had one child. He is feeling great remorse, blaming himself and his wife. His marriage has broken up and he feels the abortion has had a direct bearing on this. He says that nothing material that they have acquired is worth the destruction of their baby. Now he hates what he originally wanted to preserve because everything reminds him of the real price they paid.

6) Name: D. Age: 23 Status: Single

A suction abortion at 10 weeks, one month ago. The father is nowhere in the picture. Very intelligent. Career women. She now realizes she must seek some competent counseling because of her recent abortion, she is having trouble dealing with it mentally.

7) Name: M. Age: 27 Status: Single

Lives at home with mother. Became pregnant after a neighbor in the same building forced her to have intercourse. Pregnancy that resulted was "her problem". He wanted nothing to do with it. After a few months of anguish and worry because of medication she had taken she decided to have a saline abortion on the advice of doctor and social worker. This was three years ago. The man has since married and has a one-year-old baby. They still live in the same apartment building and this is a constant reminder to her of her abortion and the child that she might have had. Her problems are the same--Life has not become easier because she didn't carry her baby--only sadder.

8) Name: N. Age: 22 Status: Married

Four years before at 18 she had a suction abortion at a local clinic. After the abortion she experienced heavy bleeding and a fever. By the time she became alarmed enough to go to a hospital the complications had become so serious that the doctors there had to perform a hysterectomy. She has been married for a year. She has not told her husband about her inability to have children. He wants a child very much.

9) Name: M. Age: 19 Status: Single

Crying and distraught. Eight weeks after abortion she came across fetal development pictures and was very distressed to find that what the doctor and social worker had assured her "was just a piece of tissue" was in reality a well-developed baby.

10) Name: I. Age: 59 Status: Married

Had abortion at age 15, 44 years ago. Single at time of abortion. Abortion was not legal but she was able to find an abortionist and had it done illegally. Her statement "The following year she married father of the baby she aborted and even then they were no better off financially." During married years they had three more children. She has always regretted the fact that she had the abortion and that the little baby that she aborted is never far from her mind even after all these years. Nothing could be so bad as living with this memory. She can still see the abortion instrument in her mind's eye.

11) Name: P. Age: 19 Status: Single

"Always knew abortion was wrong. Even when I found I was pregnant and not married. Nothing made my conviction stronger than when I witnessed the terrible hemorrhaging, pain and trauma my friend experienced after her legal suction abortion."

12) Name: P. Age: 20 Status: Single

"When my boyfriend realized what really was involved in an abortion, he cried when he told me his former girlfriend had aborted her (their) baby."

13) Name: V. Age: 26 Status: Single

One child. Five years old. Had her abortion four years ago. She said that when you are a career woman and working every day you can always put the abortion in the back of your mind. V. lost her job four months ago and every day she remembers the date of her abortion; the date the baby was due; what the baby would have been; what he/she would look like and the questions that go on and on. "Once you have had an abortion you never forget--you always wonder what might have been."

ANNUAL SUMMARY 1972

Issued April 1974

CENTER FOR DISEASE CONTROL
ABORTION SURVEILLANCE

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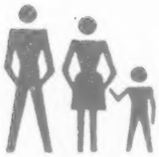

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE

I. SUMMARY

In 1972, 586,760 legal abortions were reported to the Center for Disease Control (CDC) from 27 states and the District of Columbia. The national abortion ratio (number of abortions per 1,000 live births) increased from 136.0 in 1971 to 180.1 in 1972. Of the abortions reported in 1972, 43.8% were performed in states outside the woman's state of residence, compared with 41.5% in 1971.

In 1972, approximately one-third of reported legal abortions were performed on women less than 20 years old. In 10 states, abortions outnumbered live births for women less than 15 years old. By race, 75.7% of women undergoing legal abortions were white; 22.6% were of black and other races. Estimates of race-specific national abortion ratios indicated that whites had 161 abortions per 1,000 live births compared with 225 for blacks Approximately 70% of legal abortions were performed on women who were either single, widowed, separated, or divorced. For all states with available data, abortion ratios for unmarried women were higher than for currently married women. In 8 states, more unmarried pregnant women had legal abortions than had live births. Of the abortions reported, 84.1% were performed by curettage (suction or sharp); and 79.1% were performed in the first trimester of pregnancy.

A review of the data from states with information available for both 1971 and 1972 shows that (1) the percent of abortions to women less than 20 years old increased, and the median age for all women having abortions decreased from 23.0 to 22.7;
(2) the percent of currently married women having abortions decreased from 33.1% to 30.8%; (3) the percent of abortions performed by suction or sharp curettage was essentially unchanged (84.5% to 84.6%); and (4) the percent of abortions performed in the first trimester also changed little--increasing from 78.2% to 78.6%.

In 1972, a total of 71 maternal deaths related to abortions were reported to CDC by the 50 states, New York City, and the District of Columbia; 19 of the 71 were associated with legally induced abortions. Using the 586,760 legally induced abortions reported to CDC in 1972 as the denominator, the overall death-to-case ratio was 3.2 deaths per 100,000 legally induced abortions.

The Special Studies Section of this report contains abstracts of 6 studies related to abortion procedures. The first study describes a cluster of complications resulting from a new method of second trimester abortion called "super coils"; the next 2 studies highlight the importance of proper Rh-immune globulin (RhIG) utilization following abortion and full-term delivery; the fourth study describes an overall death-to-case ratio of 6.5 per 100,000 legal abortions for New York State from mid-1970 to mid-1972; the fifth study describes 2 abortion deaths associated with paracervical block anesthesia; and the sixth study presents evidence which suggests that hemorrhage rates for patients undergoing saline abortion were decreased by elective removal of the placenta within the first hour after fetal delivery.

In 1972 important legislative changes and/or court decisions relating to abortion laws occurred in Connecticut, Kansas, New Jersey, and Vermont.

II. INTRODUCTION

The Center for Disease Control initiated surveillance of legal abortions in the United States in 1969. Since that time abortion laws, abortion reporting, and abortion ratios have changed dramatically (Table 1).* By the end of 1969, 9 states had

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*See Preface

DHEW Publication No. (CDC) 74-8205

enacted laws which permitted abortion on grounds other than for the preservation of the life or health of the mother. Eight states reported abortion data to CDC, and partial data were available from 2 others. Over 22,000 abortions were reported in 1969, and the number of reported legal abortions per 1,000 live births (national abortion ratio) was 6.3. By the end of 1970 a total of 16 states had liberalized their abortion laws. In states where new laws had not been enacted, permissively interpreted statutes or court orders invalidating old laws resulted in significant increases in the number of reported legal abortions. In 1970 over 193,000 legal abortions were reported to CDC, and the national abortion ratio increased 8 times to 52.0 per 1,000 live births. No significant liberalizations of any state laws were enacted in 1971, and only 1 additional state began reporting to CDC. Yet, although the reporting basis remained relatively constant, the number of reported legal abortions increased to over 485,000 and the national abortion ratio increased nearly 3 times to 136.0. In 1972, 1 additional state liberalized its laws, bringing the total to 17. Two additional states began reporting to CDC, making at least partial data available from 28 states. These states reported over 586,000 legal abortions in 1972, and the reported national abortion ratio increased again but less markedly than in previous years, to 180.1 per 1,000 live births.

III. REPORTS FROM STATES

A. Legal Abortions by Place of Residence and Place of Occurrence

The legal abortion ratio for all areas reporting in 1972 increased to 315 abortions per 1,000 live births, compared with 132 in 1970 and 267 in 1971. The abortion ratio for reporting areas differs from the national abortion ratio of 180.1 since the former is based on abortions and live births in only the 28 reporting areas shown in Table 2. The increase from 1970 to 1971 in the abortion ratio for reporting areas was over 100%, while the increase from 1971 to 1972 was 18%. Between 1970 and 1971, all areas reporting from both years, except Oregon, experienced increases in the number of reported abortions, while the abortion ratios increased for all areas reporting for both years. Between 1971 and 1972 all areas continued to report increases in both the number of reported abortions and the abortion ratio except Arizona and Mississippi, which reported fewer abortions in 1972. While 80.7% of the total reported abortions were performed in New York and California in 1970 and 79.4% were performed in New York and California in 1971, 74.7% of all reported abortions were performed in these 2 states in 1972. The 2 areas having highest abortion ratios were the District of Columbia (1,801) and New York City (1,934); the 2 areas having the lowest abortion ratios were Tennessee (0.1) and Mississippi (1). In 1970 the District of Columbia, Hawaii, New York City, and upstate New York all had abortion ratios of 200 or more, and in 1971 California, Kansas, Washington, New Mexico, and Oregon were added to the list. In 1972, however, no additional states reported abortion ratios of 200 or more. Percentage changes in the number of abortions performed in 1972 over 1971 for those states which reported data for both years ranged from Mississippi's low of -34.4% to Vermont's high of 2,466.7% (Table 3). Five of the 6 states which reported data for 3 years or more--California, Colorado, Delaware, Georgia, and North Carolina--showed progressively smaller increases in the number of abortions performed each year. This pattern was reported less exactly by Oregon where there was a small decrease (-2.8%) from 1970 to 1971 and a small increase (2.1%) from 1971 to 1972.

An abortion ratio by state of occurrence* (Table 2) reflects the relative likelihood of a legal abortion occurring in a given state compared to a live birth occurring in that state. In 1972, residency information was known for 479,725 (81.8%) of all legal abortions. Of these, 210,345 (43.8%) were performed in states outside the woman's state of residence (Table 4). The percent of reported legal abortions performed in states outside the woman's state of residence was 29.8% in July-December 1970 and 41.5% in 1971. In 1972, 74.3% of the abortions reported on out-of-state residents were performed in New York State compared with 83.8% in 1971. Four areas reported more than 60% of their abortions on out-of-state residents: District of Columbia (74.5%), New Mexico (68.9%), Kansas (63.2%), and New York City (61.2%).

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*Abortion ratio by state of occurrence is the number of abortions performed in the state per 1,000 live births occurring in that state. Abortion ratios by state of occurrence must be interpreted with great care, since the numerator contains abortions performed in a state regardless of the woman's state of residence.

Of 210,345 out-of-state legal abortions reported, the exact state of residence for women having out-of-state abortions was known for 199,489. Table 5 shows the number and percent of residents of each state having abortions in state and out-of-state by geographic region. Figure 1 shows the corresponding abortion ratios by geographic region and by state of residence and is based on the 503,423 abortions where residence was known or could be assumed.* The portion of a state's abortion ratio accounted for by abortion performed in the state on residents of that state is represented in white, and the portion of a state's abortion ratio accounted for by residents of that state having abortions out-of-state is represented in black.

The abortion ratios for the 9 geographic regions of the country also varied greatly. There was a somewhat greater similarity of ratios between states within regions. The highest ratios were reported by the Pacific (318), Mid-Atlantic (284), and New England (192) regions. Most of the abortions to residents of New England and the Middle Atlantic states were performed in New York. Residents of the Pacific Coast states generally obtained abortions in their own state of residence. The lowest regional ratios were found for the East-South-Central (45) and the West-South-Central (60) states. Compared with 1971, all but 8 states showed increases in the abortion ratios for residents in 1972.

There was a wide disparity in the abortion ratios by state of residence among the 51 areas (Figure 1). The highest ratios were for New York (397) and Washington (378) while the lowest ratios were for Idaho (1) and South Dakota (11).

B. Legal Abortions By Age

Data on reported legal abortions by age group were available for 17 states (Table 6). Abortions performed on teen-agers (females under age 20) comprised almost one-third of all the abortions. The 20-24 year age group accounted for another one-third and the remaining one-third were abortions performed on women 25 years of age or older. Figure 2 shows the percent distribution of reported legal abortions by age group for states with data available for 1970, 1971, and 1972. The percent distribution did not change significantly over the 3 years, although there was a slight increase in the percentage of abortions performed on women 15-19 years old and a slight decrease in the percentage of abortions performed on women 20-24 years old. In each of the 17 states, women at the age extremes (less than 15 and 40 and over) had the highest abortion to live birth ratios (Table 7). Ten of the 17 states reported more abortions than live births to women less than 15 years old. In 1971, women in the age groups 15-19 and 40 and over had 1 abortion for every 2 live births. In 1972 women in these age groups had approximately 1.6 abortions for every 2 live births. Figure 3 shows age specific legal abortion ratios for 1970, 1971, and 1972 for all states with data available for all 3 years. Women less than 15 years old had the largest increases in abortion ratios both between 1970 and 1971 and between 1971 and 1972. For all other age groups, the increases between 1971 and 1972 were less than the increases between 1970 and 1971.

C. Legal Abortions By Race

The number and percent of legal abortions by race and by state of occurrence were available for 15 states (Table 8). The white category includes Caucasian, Mexican, Puerto Rican, and Cuban. The category black and other comprises Negro, American Indian, Chinese, Japanese, Hawaiian, part-Hawaiian, and "other".[1] Between

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*Abortion ratio by state of residence is the number of abortions performed on residents of the state per 1,000 live births occurring in the state. The numerator includes abortions performed on residents of the state regardless of where the abortion was performed.

1971 and 1972 the percent of reported abortions (where race was known) performed on whites, decreased from 79.2% to 75.7%, while the percent performed on blacks and other races increased from 18.9% to 22.6%.

In 1972, 5 of 15 states reported an abortion ratio for whites greater then that for black and other races (Table 9). The overall abortion ratios by place of occurrence for whites (432) and black and other races (447) were approximately the same in 1972.

Estimates of race specific national abortion ratios in 1972 indicated that whites had 161 legal abortions per 1,000 live births while blacks had 225 legal abortions per 1,000 live births. This is in marked contrast to practices prior to the liberalization of abortion laws in this country in 1967. In a review of therapeutic abortions performed in New York City between 1951 and 1962, Gold et al., reported that of 4,703 reported abortions, 93% were performed on whites. "The white ratio was more than 5 times that of 'non-whites' and 26 times that of Puerto Ricans."[2] In another study, Tietze reported that from 1963 to 1965 in general hospitals participating in the Professional Activities Survey, 94% of 2,007 abortions were performed on whites, and the white ratio was twice as high as the black ratio.[3]

D. Legal Abortions By Marital Status

Seventeen states reported legal abortions by marital status (Table 10). The percentage of abortions performed on married women decreased from 33.6% in 1970 to 33.1% in 1971 to 30.8% in 1972 (Table 11). In 1972 the total abortion ratio for unmarried women was 18 times higher than that for married women (Table 12), while in 1971 it was 14 times higher for unmarried women. All states reporting had higher abortion ratios for unmarried women than for married women. In 1972, 8 of 17 states reported more legal abortions than live births to unmarried pregnant women. New York State, with a ratio of over 5,000 (5 legal abortions for every 1 live birth), continued to have the highest abortion ratio for unmarried women. The New York State ratio reflects the large number of unmarried women coming from other states to New York abortion facilities.

E. Legal Abortions By Number of Living Children

Thirteen states reported legal abortions by number of living children (Table 13). In each state and overall, more women were in the "no living children" category at the time of abortion than in any other category. Of the total number of women undergoing legal abortions in these 13 states, only a slightly greater number had 1 or more living children than had no living children. Table 14 shows that, among the 13 states which reported data by living children, abortion ratios were highest for women with no living children and women with 3 or more living children except for Mississippi, where the number of abortions performed was very small. Abortion ratios were lowest for women with 1 living child (Figure 4).

F. Legal Abortions By Type of Procedure

Abortion method data were available from 13 states and the District of Columbia (Table 15). The majority of pregnancies were terminated by suction curettage, followed in decreasing order by sharp dilatation and curettage, amniotic fluid replacement, hysterotomy-hysterectomy, and other. Of the total abortions performed where method was known, 88.6% were by curettage (suction or sharp). The states reporting the greatest proportion of abortions by curettage were Vermont (98.7%) and Washington (95.0%). In Washington, the state abortion law permitted abortion only during "the first 4 lunar months following conception." In the 6 states which reported abortions by type of procedure for each of the 3 years 1970-1972, the proportion of abortions performed by suction or sharp curettage increased from 75.5% in 1970 to 83.6% in 1971 to 85.7% in 1972. This rise was due to an increase in suction curettages from 40.6% to 76.6% over the 3 years (Figure 5). This trend of an increased proportion of total curettages with a rise in suction and a fall in sharp curettage was observed in 9 of 10 areas reporting data for at least 2 of the 3 years.

G. Legal Abortions By Length of Gestation

Table 16 shows duration of gestation for women undergoing abortions in 13 states and upstate New York. Table 17 shows related data from New York City. Overall, 79.1% of abortions were performed on women of less than 13 menstrual weeks gestation. Of the 13 states, the smallest proportion of first trimester abortions was performed in Colorado (49.9%) and the largest proportion was performed in Washington (94.9%).

For 6 states--Georgia, Hawaii, Maryland, New York, Oregon, and South Carolina--gestation data were available for 1970, 1971, and 1972 (Table 18). In 4 of the 6 states, the proportion of abortions performed in the first trimester increased over all 3 years; the exceptions were Georgia where the percentage of first trimester abortions declined from 75.0% in 1970 to 68.4% in 1972 and New York State where the percentage of first trimester abortions remained essentially unchanged between 1971 and 1972.

H. Legal Abortions With Stated Reasons Indicated

Twelve states reported the stated reasons for which abortions were performed (Table 19). In these states, excluding Alaska and Georgia, the proportion of women with mental health indications was 93.0%. In Alaska the abortion statute does not require a particular reason in order for a woman to obtain an abortion, and in Georgia a 1968 statute based on the American Law Institute Model Penal Code[6] was modified by a 1970 Federal District Court ruling which declared that the legal indications for an abortion were unconstitutional.

IV. ABORTION-RELATED DEATHS

In 1972 CDC initiated a surveillance system to determine the number of abortion-related deaths occurring annually in the United States. Data were collected through the cooperation of personnel in charge of vital statistics in the state health departments. Reports were received from all 50 states, New York City, and the District of Columbia. A total of 71 maternal deaths related to abortion of all types was reported to CDC in 1972. Of these, 19 were associated with legally induced abortions, 35 were attributed to criminal abortions, and 15 were related to spontaneous abortions. In 2 cases, the type of abortion could not be ascertained. Using the 586,760 legal abortions reported to the CDC in 1972 as the denominator, the 19 legal abortion deaths yield a death-to-case ratio of 3.2 deaths per 100,000 legally induced abortions.

Of the 19 legally induced abortions which resulted in deaths, 9 (47.4%) were performed by suction or sharp curettage, 8 (42.1%) by amniotic fluid exchange, and 2 (10.5%) by hysterotomy. Based on these figures and an analysis of total abortions performed by each method, the death-to-case ratios for specific procedures were calculated. The death to case ratio for suction and sharp curettage combined was 1.7 deaths per 100,000 abortions while the ratio for procedures using amniotic fluid exchange was 13.2 deaths per 100,000 abortions. In some states hysterotomies and hysterectomies are reported as a single category. Because of this aggregation, it is not possible to calculate a precise death-to-case ratio for these procedures. A reasonable estimate, however, would be that the risk of death from hysterotomy is at least 5 times greater than that for amniotic fluid exchange.

V. REPORTS OF SPECIAL STUDIES

A. Termination of pregnancy by "Super Coils": Morbidity Associated with a New Method of Second-Trimester Abortion. Berger GS, Bourne JP, Haber RJ, Tyler CW, Keith L, Knisely K, Zackler J: Amer J Obstet Gynec 116(3):297-304, June 1, 1973

On May 15, 1972, the Philadelphia Department of Health notified CDC of the hospitalization of an 18-year-old woman following an abortion induced by a new method called "super coils." This patient sustained a uterine laceration and a cervical perforation, requiring a total abdominal hysterectomy to control blood loss. She was 1 of a group of 15 women in the second trimester of pregnancy who came to Philadelphia from other states to undergo induced abortions in an outpatient clinic. Following the procedures, the remaining 14 women returned to their home states.

According to the originator of the method, the super coil is a plastic strip 40 cm long which is wound into a spiral 2 cm in diameter. The coil is straightened and inserted in the uterus in a fashion similar to an intrauterine contraceptive device. As many coils as will fit the space are used, and they are removed approximately 12-24 hours after insertion; at this time evacuation of the uterine contents is said to usually occur. If the uterine contents are not expelled spontaneously, they are removed with ovum forceps. The originator states that the method is safe for use by paramedical personnel.

Of the 15 women who underwent super coil abortions, 13 received follow-up evaluation within 1 week of the initial procedures. Nine (60%) of the 15 women developed complications, and 3 (20%) of them sustained major complications.

The criteria for complications in this investigation were those defined in the Joint Program for the Study of Abortion (JPSA).[5] Table 20 shows the complication rates of the patients who underwent abortion by the super coil compared with the complication rates for JPSA patients, on whom follow-up data were available, who were aborted by saline-amniotic fluid exchange, the technique most commonly employed in this country for terminating second trimester pregnancies. The complication rates, both major and total, for patients who underwent super coil abortions were higher than for patients who underwent abortions by saline-amniotic fluid exchange ($p < .05$). Until the super coil abortion technique is demonstrated to be safe in the hands of competent medical personnel and in a controlled research setting, the CDC findings suggest that it is not appropriate for use by paramedical personnel.

B. Rh-Immune Globulin Utilization

1. Rh-immune Globulin in Induced Abortion: Utilization in a High-Risk Population. Judelsohn RG, Berger GS, Wallace RB, Tiller MJ: Amer J Obstet Gynec 114(8):1031-1034, Dec 15, 1972

Among 1,731 women undergoing induced abortions in 5 urban hospitals, 236 had Rh-negative blood and no anti-Rh antibody prior to abortion. Nearly 75% of the Rh-negative patients were under 25 years of age, and 55.6% were nulliparous; approximately equal numbers of patients underwent abortions during the first and second trimesters. RhIG was not given to 31.8% of the unimmunized Rh negative patients. Studies indicate that 5% to 10% of unprotected patients undergoing induced abortions may become sensitized; failure to use RhIG could result [illegible] numbers of infants affected by Rh hemolytic disease.[6,7] The need for Rh prophylaxis to prevent such morbidity and death is underscored by the fact that women having abortions usually have an active childbearing future.

2. Rh-Immune Globulin Utilization Following Term Delivery in 3 Rural Hospitals in Northeast Georgia. Campbell CC, Meyers JD, Brandling-Bennett AD: Immunization Branch, Center for Disease Control

Three hospitals located in non-metropolitan communities of northeast Georgia, which had purchased fewer units of RhIG in 1971 than their estimated requirements, were studied from May 1 through October 31, 1972. Funding was provided for blood typing and associated laboratory costs for every obstetrical admission as well as RhIG for any woman requiring it.

Overall, utilization of RhIG improved in the 3 hospitals during the period of study. Eighty-four percent (37) of the women who should have received RhIG actually did, compared with an estimate of 36% (27 of 75) of women in need who received RhIG in the 12 months preceding the study period.

The success of the program was felt to be due in large measure to the initiative taken by laboratory directors in learning of new admissions, arranging for blood typing, and in clarifying the need for RhIG with private physicians, many of whom were not obstetrician-gynecologists.

Cost remains a significant impediment to RhIG use. The 3 hospitals in the study charged an average of $75 for typing and RhIG, which would amount to 1/3 of the charge for an uncomplicated delivery. Forty-five percent of the deliveries in these settings had no third party assistance for obstetrics costs.

C. Maternal Mortality Associated with Legal Abortions in New York State: July 1, 1970-June 30, 1972. Berger GS, Tietze C, Pakter J, Katz SH: Obstet Gynec 43(3):315-326, March 1974

In the 2-year period July 1, 1970-June 30, 1972, 446,052 legal abortions were reported in New York State. Twenty-five deaths associated with legal abortions performed in this 2-year period were reported to the Departments of Health of New York City and New York State, and the CDC. In addition, a mail survey of obstetrician-gynecologists throughout the United States discovered 4 previously unreported deaths. Based on the total of 29 deaths, the overall case-fatality ratio was 6.5 per 100,000. There was no significant difference between the fatality ratios for New York residents and non-residents. The risk of death was 7 times higher for women who underwent abortion at 13 weeks gestation or more than for those who had abortions at 12 weeks or less. Compared with suction or sharp curettage, saline-amniotic fluid exchange was associated with a 7 to 9 times greater risk of mortality and hysterotomy with a risk of mortality 100 times greater.

D. Maternal Mortality Associated with Paracervical Block Anesthesia. Berger GS, Tyler CW: Center for Disease Control; Herrod HK: County of Erie, Department of Health, Buffalo, New York.

This report describes 2 maternal deaths believed to have resulted from toxic reactions to lidocaine hydrochloride administered for paracervical block anesthesia for suction curettage abortion.

One case, a 29-year old woman at 7 menstrual weeks gestation, experienced seizures, respiratory arrest, and death following injection of an undetermined amount (either 200 or 400 mg) of epinephrine-free lidocaine hydrochloride. At autopsy there was an estimated 150 ml of blood in the ligamentous tissue adjacent to the cervix in the lower uterine segment without evidence of uterine perforation.

The other case was a 17-year old woman at 12 weeks gestation who also died of respiratory arrest following grand mal seizures which occurred within minutes of an injection of 20 ml (400 mg) of 2% epinephrine-free lidocaine hydrochloride. Prior to the injection, the barrel of the syringe had been withdrawn to determine if the needle had entered a blood vessel and blood was not aspirated. A post-mortem examination revealed no anatomical cause of death.

Toxic reactions to local anesthesia are rare. The Joint Program for the Study of Abortion (JPSA) reported a rate of 3.5 convulsions per 10,000 curettage procedures in which local anesthesia was used.[8] Toxic reactions may arise from excessive dosage or inadvertent entry of a blood vessel.

According to the Food and Drug Administration (FDA) approved package insert, the total dose of Xylocaine (lidocaine) without epinephrine, should be less than 300 mg and not over 4.5 mg/kg (2 mg/lb) of body weight. It is important to note that this dose is less than that recommended for lidocaine with epinephrine. The recommended dose may well have been exceeded in both cases.

Intra-vascular injection may occur even when blood is not obtained on aspiration prior to injection.[9] This is a possible, though unproved, factor in the second case. The risk of mortality might be reduced by adopting a technique in which anesthesia is infiltrated just beneath the mucosa.[10]

E. Management of Retained Placenta Associated with Saline Abortion. Berger GS, Tyler CW, Center for Disease Control; Kerenyi T, Park East Hospital, New York City

Retained placenta is one of the most common complications of saline-amniotic fluid exchange. A controversy exists as to whether early removal of retained placenta decreases or increases the incidence of post-abortal hemorrhange or infection. In hopes of gathering objective evidence concerning this problem, data were collected on

2,170 saline abortions,* performed by 30 physicians between July 1 and December 31, 1972, at Park East Hospital. The physicians managed cases according to their own judgment without suggestions from the study staff.

The overall complication rate was 13.8 per 100 cases. Hemorrhage accounted for over half of all complications. Risk of hemorrhage increased with age, number of previous pregnancies, and number of previous induced abortions. Each of these factors was an independent determinant of risk. Hemorrhage rates were lowest (2.7%) in the 485 patients in whom expulsion of the placenta immediately followed delivery of the fetus.

For 1,733 (82%) patients, elective removal of the placenta was not done. Among these patients the hemorrhage rate was 5.8% when the placental delivery occurred at from 1 to 60 minutes after delivery of the fetus, and increased to 16.2% when over 60 minutes had elapsed. The overall hemorrhage rate in the group with no elective removal of the placenta was 8.4% (Table 21).

Among the 374 (18%) patients in whom elective removal of the placenta was done, hemorrhage occurred in 7.2% when removal was in the first 60 minutes and in 3.0% at over 60 minutes. The overall hemorrhage rate for this group was 3.7%

The 2 groups were comparable in terms of previously mentioned factors associated with risk of hemorrhage, namely age, parity, and previous abortions. The group in which elective removal was not performed included cases in which "indicated" removal was done because of hemorrhage or fever. The requirement for blood transfusion was identical in both groups of patients (0.6%).

Fever rates in patients with and without elective removal of the placenta were the same through the first 2 hours of retention (2.2%). At 3 hours or later, elective removal carried a slightly higher risk of fever (5% vs 2%).

The data support the contention that removal of the placenta within the first hour decreases the likelihood of post-abortal hemorrhage. There is now justification for a study in which patients are randomly assigned to an early elective removal group or to a group in which management is left up to the individual physician.

VI. LEGAL NOTES

Table 22 shows the distribution of major categories of state abortion laws as of January 1, 1973. It is intended to serve as an aid in interpreting the abortion data covered by this report and is not intended to imply definitive legal research on the part of the Family Planning Evaluation Division of CDC.

Of the 28 states (including the District of Columbia) reporting legal abortions to CDC in 1972, 4 (Arizona, Connecticut, Nebraska, and Tennessee) had laws permitting abortion only to save the woman's life; 1 (Mississippi) included rape as an indication; 2 (Massachusetts and Pennsylvania) prohibited "unlawful abortion"; 3 (Alabama, District of Columbia, and Vermont) included threats to maternal life or health as indications; 10 (Arkansas, Colorado, Delaware, Florida, Kansas, Maryland, New Mexico, North Carolina, South Carolina, and Virginia) operated under the American Law Institute Model Abortion Law; 1 (Oregon) had a law based on 1968 recommendations of the American College of Obstetricians and Gynecologists; 4 (Alaska, Hawaii, New York, and Washington) had no legal restriction on reasons for abortion prior to fetal viability; and 3 (California, Georgia, and Wisconsin) had legal restrictions on reasons for abortion invalidated by court decisions.

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*Sixty cases in which complications occurred prior to the delivery of the fetus and 3 cases in which the interval from delivery of the fetus to delivery of the placenta was unknown were excluded from further analysis.

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Table 1

CHRONOLOGICAL RECORD OF THE STATUS OF ABORTION LAW CHANGES, ABORTION REPORTING, AND ABORTION RATIOS IN THE UNITED STATES 1969-1972

	1969	1970	1971	1972
Cumulative No. of States with Reform Abortion Laws Enacted Since 1967	9	16	16	17
No. of States from which State-wide Abortion Data are Reported*	8	17	18	20
Additional States from which Abortion Data are Reported from Individual Hospitals or Facilities	2	7	7	8
Total No. of States from which Partial or Complete Abortion Data are Reported*	10	24	25	28
Total No. of Abortions Reported to CDC	22,670	193,491	485,816	586,760
National Abortion Ratio (Abortions per 1,000 Live Births)	6.3	52.0	136.0	180.1

*Beginning 1970 includes District of Columbia.

Table 2

REPORTED LEGAL ABORTION RATIOS
BY PLACE OF OCCURRENCE
SELECTED STATES,* 1972

State	Abortions[1]	Live Births[3]	Abortions/1,000 Live Births
Alabama	1,156[2]	61,765	19
Alaska	1,172	6,948	169
Arizona	275[2]	37,258[3]	7
Arkansas	793	32,985[3]	24
California	138,584	329,826	420
Colorado	5,260	38,585	136
Connecticut	2,579[2]	39,130[3]	66
Delaware	1,342	8,867[3]	151
Dist. of Columbia	38,868	21,579[3]	1,801
Florida[4]	3,378	81,276[3]	42
Georgia	2,509	87,366	29
Hawaii	4,547	15,413	295
Kansas	12,248	33,176	369
Maryland	9,093	51,059[3]	178
Massachusetts[5]	3,394	82,192[3]	41
Mississippi	61	45,907	← 1
Nebraska	789[2]	23,473	34
New Mexico	5,989[2]	20,589[3]	291
New York	299,891	253,439	1,183
(City)	(223,373)[6]	(115,498)[3]	(1,934)
(Upstate)	(76,518)	(137,941)	(555)
North Carolina	8,365	88,894	94
Oregon	7,143	31,308	228
Pennsylvania	8,540[2]	164,742[3]	52
South Carolina	854	48,873	17
Tennessee	9[2]	65,799	**
Vermont	231	7,257	32
Virginia	4,496	75,068	60
Washington	17,767	47,168[3]	377
Wisconsin	7,427[2]	64,142[3]	116
Total	586,760	1,864,064	315

1. Data from state health departments unless otherwise noted.
2. Reported from 1 or more hospitals in state.
3. Live birth data from Monthly Vital Statistics Report Provisional Statistics, Vol.21, No.12, March 1, 1973, No.9, November 27, 1972, No.3, May 24, 1972, and Vol.20, Nos. 10-12, 1971-72.
4. April-December 1972.
5. October 1971-September 1972.
6. Estimated by New York City Health Department; July 1973 report.

* All states with data available.
** Ratio less than 1.

Table 3

PERCENT INCREASE* IN ABORTIONS
FOR EACH FULL YEAR OF REPORTING:
SELECTED STATES** 1969-1972

	YEAR			
State	1969	1970	1971	1972
Alaska				2.4
Arkansas				24.5
California	205.7	326.2	78.8	18.7
Colorado	100.8	158.1	81.5	26.2
Delaware			101.6	18.9
Dist. of Col.				105.7
Georgia		318.6	124.0	58.9
Hawaii				10.0
Kansas				29.3
Maryland				9.5
Mississippi				-34.4
New York				11.7
N. Carolina	108.9	344.9	222.6	81.1
Oregon		411.4	-2.8	2.1
S. Carolina				17.5
Vermont				2,466.7
Virginia				18.6
Washington				23.8

*Percent increase over previous year.
**All states with data available.

Table 4

REPORTED LEGAL ABORTIONS PERFORMED
ON OUT-OF-STATE RESIDENTS
SELECTED STATES,* 1972

State	Total Abortions Performed	No. of Abortions With Residence Known[1]	No. Abortions On Out-of-State Residents	Percent of Abortions With Known Residence Performed on Out-of-State Residents
Alabama	1,156	1,156	4	0.3
Alaska	1,172	1,171	14	1.2
California	138,584	126,356	20,201	16.0
Colorado	5,260	5,260	405	7.7
Connecticut	2,579	2,579	3	0.1
Delaware	1,342	1,342	63	4.7
Dist. of Col.	38,868	28,308	21,101	74.5
Georgia	2,509	2,509	0	0.0
Hawaii	4,547	4,547	25	0.5
Kansas	12,248	12,248	7,736	63.2
Maryland	9,093	9,093	186	2.0
Mississippi	61	61	0	0.0
New Mexico	5,989	5,989	4,127	68.9
New York	258,285	257,208	156,255	60.8
(City)[2]	(181,767)	(180,796)	(110,633)	(61.2)
(Upstate)	(76,518)	(76,412)	(45,622)	(59.7)
N. Carolina	8,365	8,324	53	0.6
Oregon	7,143	7,143	14	0.2
S. Carolina	854	853	5	0.6
Tennessee	9	9	0	0.0
Vermont	231	231	38	16.5
Virginia	4,496	4,484	4	0.1
Wisconsin[3]	7,427	856	111	13.0
Total	510,218	479,725	210,345	43.8

1. Number with residence known refers to in-state or out-of-state residence status. Residence information for New Mexico is estimated.
2. Numbers are from certificates filed January - December, 1972.
3. Of the 6 hospitals reporting data, 2 did not identify residence status.

*All states reporting residency; data for Alabama, Connecticut, New Mexico, Tennessee, and Wisconsin are from hospitals.

Table 5

REPORTED LEGAL ABORTIONS WITH STATE OF RESIDENCE KNOWN--1972

States by Region	Abortions Performed In State of Residence No.	%	Abortions Performed Outside State of Residence No.	%	Total
NEW ENGLAND	(6,163)	*(19.3)*	(25,845)	*(80.7)*	(32,008)
Maine	0	*0.0*	1,690	*100.0*	1,690
New Hampshire	0	*0.0*	1,483	*100.0*	1,483
Vermont	193	*18.3*	859	*81.7*	1,052
Massachusetts	3,394[1,2]	*19.3*	14,187	*80.7*	17,581
Rhode Island	0	*0.0*	1,869	*100.0*	1,869
Connecticut	2,576[3,4]	*30.9*	5,757	*69.1*	8,333
MIDDLE ATLANTIC	(109,111)	*(74.6)*	(37,108)	*(25.4)*	(146,219)
New York	100,571	*100.0*	44	*0.0*	100,615
New Jersey	0	*0.0*	22,832	*100.0*	22,832
Pennsylvania	8,540[1,3]	*37.5*	14,232	*62.5*	22,772
EAST NORTH CENTRAL	(743)	*(1.4)*	(53,211)	*(98.6)*	(53,954)
Ohio	0	*0.0*	16,666	*100.0*	16,666
Indiana	0	*0.0*	5,481	*100.0*	5,481
Illinois	0	*0.0*	14,091	*100.0*	14,091
Michigan	0	*0.0*	14,626	*100.0*	14,626
Wisconsin	743[3]	*24.0*	2,347	*76.0*	3,090
WEST NORTH CENTRAL	(5,301)	*(28.7)*	(13,139)	*(71.3)*	(18,440)
Minnesota	0	*0.0*	2,227	*100.0*	2,227
Iowa	0	*0.0*	2,356	*100.0*	2,356
Missouri	0	*0.0*	6,953	*100.0*	6,953
North Dakota	0	*0.0*	148	*100.0*	148
South Dakota	0	[illegible]	116	*100.0*	116
Nebraska	789[3]	*43.[illegible]*	1,008	*56.1*	1,797
Kansas	4,512	*93.2*	331	*6.8*	4,843
SOUTH ATLANTIC	(36,879)	*(52.2)*	(33,833)	*(47.8)*	(70,712)
Delaware	1,279	*58.3*	914	*41.7*	2,193
Maryland	8,907	*59.7*	6,022	*40.3*	14,929
Dist. of Columbia	7,207	*98.0*	145	*2.0*	7,352
Virginia	4,480	*40.0*	6,707	*60.0*	11,187
West Virginia	0	*0.0*	1,491	*100.0*	1,491
North Carolina	8,271	*70.0*	3,539	*30.0*	11,810
South Carolina	848	*27.7*	2,208	*72.3*	3,056
Georgia	2,509	*35.5*	4,561	*64.5*	7,070
Florida	3,378[1,3]	*29.1*	8,246	*70.9*	11,624

Table 5 (Continued)

States by Region	Abortions Performed In State of Residence No.	Abortions Performed In State of Residence %	Abortions Performed Outside State of Residence No.	Abortions Performed Outside State of Residence %	Total
EAST SOUTH CENTRAL	(1,222)	(11.8)	(9,168)	(88.2)	(10,390)
Kentucky	0	0.0	3,132	100.0	3,132
Tennessee	9	0.2	4,279	99.8	4,288
Alabama	1,152[3]	54.9	948	45.1	2,100
Mississippi	61	7.0	809	93.0	870
WEST SOUTH CENTRAL	(793)	(3.7)	(20,837)	(96.3)	(21,630)
Arkansas	793[1]	51.0	762	49.0	1,555
Louisiana	0	0.0	1,210	100.0	1,210
Oklahoma	0	0.0	2,843	100.0	2,843
Texas	0	0.0	16,022	100.0	16,022
MOUNTAIN	(6,992)	(53.5)	(6,084)	(46.5)	(13,076)
Montana	0	0.0	172	100.0	172
Idaho	0	0.0	20	100.0	20
Wyoming	0	0.0	269	100.0	269
Colorado	4,855	89.4	573	10.6	5,428
New Mexico	1,862[3,4]	94.9	100	5.1	1,962
Arizona	275[1,3]	9.6	2,590	90.4	2,865
Utah	0	0.0	730	100.0	730
Nevada	0	0.0	1,630	100.0	1,630
PACIFIC	(136,730)	(99.8)	(264)	(0.2)	(136,994)
Washington	17,767[2]	99.8	42	0.2	17,809
Oregon	7,129	99.3	49	0.7	7,178
California	106,155	99.9	152	0.1	106,307
Alaska	1,157	99.2	9	0.8	1,166
Hawaii	4,522	99.7	12	0.3	4,534
TOTAL	303,934	60.4	199,489	39.6	503,423

1. Residency information not available; all abortions reported are assumed to have been performed on residents of the state.
2. October 1971-September 1972.
3. Reported from one or more hospitals in state.
4. Estimated.
5. April-December.

Table 6

REPORTED LEGAL INDUCED ABORTIONS BY AGE AND PLACE OF OCCURRENCE, SELECTED STATES,[*] 1972

State	<15		15-19		20-24		25-29		30-34		35-39		≥ 40		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Alaska	23	2.0	389	33.2	335	28.6	187	16.0	151	12.9	62	5.3	18	1.5	7	0.6	1,172	100.0
Arkansas	21	2.6	294	37.1	217	27.4	106	13.4	85	10.7	51	6.4	19	2.4	0	0.0	793	100.0
California	1,998	1.4	45,358	32.7	44,010	31.8	24,165	17.4	13,014	9.4	7,275	5.2	2,688	1.9	76	0.1	138,584	100.0
Colorado	81	1.5	1,820	34.6	1,720	32.7	780	14.8	448	8.5	265	5.0	128	2.4	18	0.3	5,260	100.0
Delaware	115[1]	8.6	466[2]	34.7	270[3]	20.1	202	15.1	145	10.8	107	8.0	37	2.8	0	0.0	1,342	100.0
Georgia	124	4.9	749	29.9	705	28.1	428	17.1	288	11.5	152	6.1	63	2.5	0	0.0	2,509	100.0
Hawaii	32	0.7	1,144	25.2	1,515	33.3	833	18.3	525	11.5	336	7.4	157	3.5	5	0.1	4,547	100.0
Kansas	241	2.0	4,570	37.3	3,717	30.3	1,653	13.5	1,016	8.3	722	5.9	327	2.7	2	0.0	12,248	100.0
Maryland	260	2.9	3,039	33.4	2,553	28.1	1,491	16.4	955	10.5	560	6.2	235	2.6	0	0.0	9,093	100.0
Mississippi	1	1.6	22	36.1	12	19.7	12	19.7	4	6.6	6	9.8	4	6.6	0	0.0	61	100.0
New York	3,434	1.1	85,833	28.6	97,105	32.4	50,402	16.8	29,505	9.8	17,101	5.7	7,244	2.4	9,267	3.1	299,891	100.0
(City)[4]	(2,571)	(1.2)	(61,026)	(27.3)	(72,457)	(32.4)	(38,618)	(17.3)	(22,114)	(9.9)	(12,412)	(5.6)	(5,032)	(2.3)	(9,123)	(4.1)	(223,373)	(100.0)
(Upstate)	(863)	(1.1)	(24,807)	(32.4)	(24,648)	(32.2)	(11,784)	(15.4)	(7,391)	(9.7)	(4,685)	(6.2)	(2,192)	(2.9)	(144)	(0.2)	(76,518)	(100.0)
N. Carolina	220	2.6	2,832	33.9	2,312	27.6	1,277	15.3	850	10.2	539	6.4	243	2.9	92	1.1	8,365	100.0
Oregon	172	2.4	2,506	35.1	2,303	32.2	1,090	15.3	597	8.4	328	4.6	142	2.0	5	0.1	7,143	100.0
S. Carolina	34	4.0	199	23.3	233	27.2	149	17.4	98	11.5	85	10.0	38	4.4	18	2.1	854	100.0
Vermont	1	0.4	74	32.0	76	32.9	41	17.7	19	8.2	16	6.9	4	1.7	0	0.0	231	100.0
Virginia	182	4.0	1,458	32.4	1,210	26.9	659	14.7	492	10.9	356	7.9	133	3.0	6	0.1	4,496	100.0
Washington	214	1.2	6,598	37.1	5,747	32.3	2,594	14.6	1,399	7.9	878	4.9	327	1.8	10	0.1	17,767	100.0
Total	7,153	2.4	137,351	30.8	164,040	31.8	86,069	16.7	49,391	8.8	28,839	5.6	11,807	2.8	9,306	3.0	314,336	100.0

1. <16.
2. 16-20.
3. 21-24.
4. Numbers in each category based on age distribution of 1972 certificates applied to 1972 total abortions estimated by New York City Health Department.

[*] All states with data available.

Table 7

AGE-SPECIFIC LEGAL ABORTION RATIOS,[1]
SELECTED STATES,* 1972

State	<15	15-19	20-24	25-29	30-34	35-39	≥40	Total
Alaska	2,091	359	125	94	193	192	250	169
Arkansas[3]	116	37	17	15	28	37	46	24
California	2,664	844	352	263	330	494	658	420
Colorado[2]	1,397	272	111	74	110	195	346	136
Delaware[2]	2,054	293	82	83	149	261	339	151
Georgia	191	34	22	20	34	49	82	29
Hawaii	1,143	535	279	173	253	453	863	295
Kansas	3,051	716	289	182	314	599	945	369
Maryland[3]	1,275	330	139	102	160	262	447	178
Mississippi	2	2	1	1	1	3	6	1
New York	5,512	2,623	1,106	635	846	1,272	2,097	1,183
(City)[2]	(7,675)	(4,012)	(1,768)	(1,115)	(1,369)	(1,902)	(3,124)	(1,934)
(Upstate)	(2,997)	(1,417)	(527)	(264)	(395)	(678)	(1,193)	(555)
N. Carolina	497	128	71	60	100	170	278	94
Oregon	3,308	453	186	119	196	357	597	278
S. Carolina[3]	118	18	12	14	21	45	73	17
Vermont	100	62	27	19	24	59	54	32
Virginia	545	97	46	32	57	112	168	60
Washington[3]	3,242	877	298	193	292	535	730	377
Total	1,689	720	369	261	360	555	849	428

1. Calculated as the number of legal abortions for women of a given age group per 1,000 live births to women of the same age group. Sources of data are Table 6 of this report for abortions by age; live births by age of mother are from State Health Departments unless otherwise noted.
2. Source of live birth data is Table 2 for total 1972 live births; live birth distribution by age of mother is from National Center for Health Statistics. 1969 distribution applied to 1972 births.
3. Source of live birth data is Table 2 for total 1972 live births; live birth distribution by age of mother is 1971 distribution.

*All states with data available.

Table 8

REPORTED LEGAL ABORTIONS, BY RACE AND PLACE OF OCCURRENCE, SELECTED STATES,* 1972

State	White		Black & Other		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%
Alaska	899	76.7	271	23.1	2	0.2	1,172	100.0
Arkansas	713	89.9	80	10.1	0	0.0	793	100.0
California	104,686	75.5	26,913	19.4	6,985	5.0	138,584	100.0
Colorado	4,001	76.1	501	9.5	758	14.4	5,260	100.0
Delaware	835	62.2	507	37.8	0	0.0	1,342	100.0
Georgia	1,244	49.6	1,263	50.3	2	0.1	2,509	100.0
Hawaii	1,781	39.2	2,743	60.3	23	0.5	4,547	100.0
Kansas	10,613	86.7	1,432	11.7	203	1.7	12,248	100.0
Maryland	4,532	49.8	4,419	48.6	142	1.6	9,093	100.0
Mississippi	47	77.0	14	23.0	0	0.0	61	100.0
New York	232,591	77.6	67,300	22.4	0	0.0	299,891	100.0
(City)[1]	(164,156)	(73.5)	(59,217)	(26.5)	(0)	(0.0)	(223,373)	(100.0)
(Upstate)	(68,435)	(89.4)	(8,083)	(10.6)	(0)	(0.0)	(76,518)	(100.0)
N. Carolina	5,618	67.2	2,729	32.6	18	0.2	8,365	100.0
S. Carolina	553	64.8	297	34.8	4	0.5	854	100.0
Vermont	216	93.5	2	0.9	13	5.6	231	100.0
Virginia	2,315	51.5	2,181	48.5	0	0.0	4,496	100.0
Total	370,644	75.7	110,652	22.6	8,150	1.7	489,446	100.0

1. Numbers in each category based on racial distribution from 1972 certificates filed, applied to 1972 annual abortions estimated by New York City Health Department.

*All states with data available.

Table 9

LEGAL ABORTION RATIOS[1], BY RACE
SELECTED STATES,* 1972

State	White Ratio	Black & Other Ratio	White/Black & Other Ratio
Alaska	175	151	1.2
Arkansas[2]	29	10	2.9
California	390	599	0.7
Colorado	129	252	0.5
Delaware[2]	119	273	0.4
Georgia	22	42	0.5
Hawaii	324	279	1.2
Kansas	356	518	0.7
Maryland[2]	120	351	0.3
Mississippi	2	1	2.0
New York	1,137	1,377	0.8
(City)[2]	(2,080)	(1,619)	(1.3)
(Upstate)	(545)	(657)	(0.8)
N. Carolina	91	100	0.9
S. Carolina[2]	18	16	1.1
Vermont	32	39	0.8
Virginia	40	124	0.3
Total	432	447	1.0

1. Ratio calculated as the number of race-specific abortions per 1,000 race-specific live births. Table 8 is source for number of abortions by race; "unknown" race for each state distributed according to known racial distribution of that state. Race-specific live births are from state health departments unless otherwise noted.
2. Source of live birth data is Table 2 for total 1972 births. Live births by race for Arkansas, Maryland, New York City, and South Carolina based on 1971 distribution applied to total 1972 births; live births by race for Delaware is 1969 distribution applied to total 1972 births.

*All states with data available.

Table 10

REPORTED LEGAL ABORTIONS, BY MARITAL STATUS
AND STATE OF OCCURRENCE, SELECTED STATES,* 1972

State	Married		Unmarried[1]		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%
Alaska	408	*34.8*	744	*63.5*	20	*1.7*	1,172	*100.0*
Arkansas	256	*32.3*	537	*67.7*	0	*0.0*	793	*100.0*
California	36,221	*26.1*	98,490	*71.1*	3,873	*2.8*	138,584	*100.0*
Colorado[3]	1,108	*21.1*	3,051	*58.0*	1,101	*20.9*	5,260	*100.0*
Delaware	394	*29.4*	948	*70.6*	0	*0.0*	1,342	*100.0*
Georgia	841	*33.5*	1,571	*62.6*	97	*3.9*	2,509	*100.0*
Hawaii[2]	1,707	*37.5*	2,840	*62.5*	0	*0.0*	4,547	*100.0*
Kansas	3,086	*25.2*	9,161	*74.8*	1	*0.0*	12,248	*100.0*
Maryland	2,670	*29.4*	6,365	*70.0*	58	*0.6*	9,093	*100.0*
Mississippi[2]	34	*55.7*	27	*44.3*	0	*0.0*	61	*100.0*
New York	93,315	*31.1*	206,576	*68.9*	0	*0.0*	299,891	*100.0*
(City)[3]	(62,356)	*(27.9)*	(161,017)	*(72.1)*	(0)	*(0.0)*	(223,373)	*(100.0)*
(Upstate)[4]	(30,959)	*(40.5)*	(45,559)	*(59.5)*	(0)	*(0.0)*	(76,518)	*(100.0)*
N. Carolina	2,895	*34.6*	5,456	*65.2*	14	*0.2*	8,365	*100.0*
Oregon	1,695	*23.7*	5,448	*76.3*	0	*0.0*	7,143	*100.0*
S. Carolina	344	*40.3*	505	*59.1*	5	*0.6*	854	*100.0*
Vermont	69	*29.9*	160	*69.3*	2	*0.9*	231	*100.0*
Virginia[2]	1,530	*34.0*	2,966	*66.0*	0	*0.0*	4,496	*100.0*
Washington	4,721	*26.6*	13,013	*73.2*	33	*0.2*	17,767	*100.0*
Total	151,294	*29.4*	357,858	*69.6*	5,204	*1.0*	514,356	*100.0*

1. Unmarried includes women who are widowed, separated, divorced, and women who have never married.
2. Legitimate and illegitimate.
3. Numbers are based on distribution of data from certificates filed in 1972 and total abortions for 1972 as estimated by the New York City Health Department.
4. When no information was given for the father as required on the certificate, it was inferred that the woman was unmarried.

*All states with data available.

Table 11

PERCENTAGE OF TOTAL ABORTIONS ON MARRIED WOMEN BY STATE OF OCCURRENCE, 1970-1972*

State	1970	1971	1972
Alaska	30.5[1]	33.7	34.9
Arkansas	---	31.1	32.3
Delaware	30.2	33.4	29.4
Georgia	43.7	36.2	33.5
Hawaii	36.8[2,3]	37.3[3]	37.5[3]
Kansas	---	27.7	25.2
Maryland	31.6[4]	30.9	29.4
New York	---	33.6	31.1
(City)	---	(31.2)[6]	(27.9)[7]
(Upstate)	(37.2)[4]	(42.4)	(40.5)
N. Carolina	---	39.1	34.8
Oregon	23.0	24.2	23.7
S. Carolina	37.2[5]	39.8	40.3
Virginia	---	38.4[3]	34.0[3]
Washington	---	28.9	26.6
Overall Percent Married	33.6	33.1	30.8
Percent married for the 8 states with data for 1970, 1971, and 1972	33.6	38.9	37.8

1. July 29 - December 31.
2. March 11 - December 31.
3. Stated as legitimate rather than married.
4. July - December.
5. February - December.
6. Data from certificates filed; July - December.
7. Data from certificates filed; 1972.

*All states with data available for at least 2 of the 3 years.

Table 12

ESTIMATED LEGAL ABORTION RATIOS BY MARITAL STATUS,[1] SELECTED STATES,* 1972

State	Married	Unmarried[2]
Alaska[3]	65	1,337
Arkansas	9	121
California[4]	122	4,080
Colorado	40	1,054
Delaware[3]	52	737
Georgia[5]	12	140
Hawaii	121	2,084
Kansas	101	3,397
Maryland	62	827
Mississippi[3]	1	3
New York	431	5,583
(City)[4]	(687)	(6,514)
(Upstate)[4]	(246)	(3,709)
North Carolina[5]	38	436
Oregon[5]	59	2,135
South Carolina	8	67
Vermont	11	272
Virginia	23	324
Washington	110	3,241
Total	144	2,579

1. Calculated as legal abortions to women of a given marital status per 1,000 live births to women in that marital status. Table 10 is source for number of abortions by marital status. "Unknown" marital status for each state distributed according to known marital status distribution of that state. Live births to married women are legitimate births; live births to unmarried women are assumed to be registered as illegitimate births. Legitimacy distribution of live births based on state's 1971 distribution unless otherwise noted.
2. Unmarried includes women who are widowed, separated, divorced, and women who have never married.
3. Live births by legitimacy status are based on 1969 distribution applied to 1972 births.
4. Live births by legitimacy status are based on 1970 distribution applied to 1972 births.
5. Live births by legitimacy status are 1972 data from State Health Department.

*All states with data available.

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Table 13

REPORTED LEGAL ABORTIONS BY NUMBER OF LIVING CHILDREN
AND STATE OF OCCURRENCE, SELECTED STATES*, 1972

State	0		1		2		3		4		≥5		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Alaska	611	52.1	166	14.2	174	14.8	95	8.1	45	3.8	45	3.8	36	3.1	1,172	100.0
California[1]	53,805	38.8	31,364	22.6	19,714	14.2	13,022	9.4	7,845	5.7	9,600	6.9	3,234	2.3	138,584	100.0
Colorado	2,386	45.4	541	10.3	540	10.3	293	5.6	141	2.7	124	2.4	1,235	23.5	5,260	100.0
Delaware[2]	566	42.2	267	19.9	226	16.8	152	11.3	61	4.5	70	5.2	0	0.0	1,342	100.0
Georgia	1,013	40.4	496	19.8	414	16.5	292	11.6	155	6.2	138	5.5	1	0.0	2,509	100.0
Kansas	7,419	60.6	1,514	12.4	1,463	11.9	919	7.5	517	4.2	416	3.4	0	0.0	12,248	100.0
Maryland	3,943	43.4	1,838	20.2	1,568	17.2	879	9.7	433	4.8	432	4.8	0	0.0	9,093	100.0
Mississippi	25	41.0	7	11.5	11	18.0	4	6.6	4	6.6	10	16.4	0	0.0	61	100.0
New York	146,669	48.9	43,782	14.6	33,555	11.2	22,450	7.5	12,659	4.2	12,706	4.2	28,070	9.4	299,891	100.0
(City)[3]	(116,055)	(52.0)	(38,387)	(17.2)	(28,011)	(12.5)	(18,641)	(8.3)	(10,593)	(4.7)	(10,898)	(4.9)	(788)	(0.4)	(223,373)	(100.0)
(Upstate)[2]	(30,614)	(40.0)	(5,395)	(7.1)	(5,544)	(7.2)	(3,809)	(5.0)	(2,066)	(2.7)	(1,808)	(2.4)	(27,282)	(35.7)	(76,518)	(100.0)
N. Carolina	3,946	47.2	1,273	15.2	1,217	14.5	724	8.7	313	3.7	348	4.2	544	6.5	8,365	100.0
S. Carolina	350	41.0	137	16.0	142	16.6	102	11.9	54	6.3	68	8.0	1	0.1	854	100.0
Vermont	150	64.9	16	6.9	19	8.2	14	6.1	11	4.8	10	4.3	11	4.8	231	100.0
Virginia	1,774	39.5	671	14.9	687	15.3	459	10.2	214	4.8	222	4.9	469	10.4	4,496	100.0
Total	222,657	46.0	82,072	17.0	59,730	12.3	39,405	8.1	22,452	4.6	24,189	5.0	33,601	6.9	484,106	100.0

1. Number of previous pregnancies.
2. Number of prior viable births.
3. Number in each category based on pregnancy order distribution of 1972 certificates applied to 1972 total abortions estimated by New York City Health Department.

*All states with data available.

Table 14

ABORTION TO LIVE BIRTH RATIO[1] BY NUMBER OF PREVIOUS LIVE BIRTHS, SELECTED STATES,* 1972

State	0	1	2	3	≥4
Alaska	216	82	196	222	165
California	403	333	421	575	701
Colorado	202	67	118	126	102
Delaware	163	108	173	196	164
Georgia[2]	27	20	34	49	42
Kansas	569	159	296	370	294
Maryland	190	123	205	232	219
Mississippi	2	1	2	1	1
New York	1,616	630	975	1,318	1,387
(City)	(2,362)	(1,169)	(1,731)	(2,347)	(2,388)
(Upstate)	(911)	(202)	(402)	(552)	(554)
N. Carolina	115	56	100	118	85
S. Carolina	18	11	20	26	23
Vermont	54	8	20	29	42
Virginia	60	34	76	110	102
Total	552	281	408	539	534

1. Calculated as legal abortions in 1972 to women with X number of living children divided by the number of women having live births in 1972 with X number of previous live births. Table 13 is source for number of abortions by number of living children. Distribution of live births for 1972 are from State Health Departments with the following exceptions: Maryland and New York City total live births in 1972 were distributed according to live birth order in 1971 from States' Vital Statistics Reports; for Colorado, Delaware, Mississippi, North Carolina, and South Carolina total live births in 1972 were distributed according to live birth order in 1969, the most recent year available from the National Center for Health Statistics.
2. Live births of unknown birth order were redistributed according to known birth order distribution.

*All states with data available.

Table 15

REPORTED LEGAL ABORTIONS BY TYPE OF PROCEDURE AND STATE OF OCCURRENCE
SELECTED STATES,* 1972

State	Sharp D&C		Suction Curettage		Amniotic Fluid Replacement		Hysterotomy		Hysterectomy		Other		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Alaska	309	26.4	728	62.1	103	8.8	5	0.4	13	1.1	3	0.3	11	0.9	1,172	100.0
California	82,632	59.6	33,988	24.5	11,977	8.6	–[1]	–	–[1]	–	–[1]	–	9,987[1]	7.2	138,584	100.0
Dist. of Col.	2,740	7.0	24,369	62.7	1,654	4.3	85	0.2	7	0.0	–[2]	–	10,013	25.8	38,868	100.0
Georgia	11	0.4	1,768	70.5	687	27.4	5	0.2	32	1.3	2	0.1	4	0.2	2,509	100.0
Hawaii	309	6.8	1,760	38.7	156	3.4	6	0.1	9	0.2	3	0.1	2,304	50.7	4,547	100.0
Kansas	2,402	19.6	9,116	74.4	546	4.5	26	0.2	153	1.2	5	0.0	0	0.0	12,248	100.0
Maryland	274	3.0	6,001	66.0	2,039	22.4	312	3.4	251	2.8	216	2.4	0	0.0	9,093	100.0
Massachusetts[3]	1,644	48.4	857	25.3	619	18.2	–	–	192[4]	5.7	–[2]	–	82	2.4	3,394	100.0
New York	27,817	9.3	231,423	77.2	32,779	10.9	763	0.3	153	0.1	1,597	0.5	5,359	1.8	299,891	100.0
(City)[5]	(23,936)	(10.7)	(172,827)	(77.4)	(24,461)	(11.0)	(526)	(0.2)	(79)	(0.0)	(1,544)	(0.7)	(0)	(0.0)	(223,373)	(100.0)
(Upstate)	(3,881)	(5.1)	(58,596)	(76.6)	(8,318)	(10.9)	(237)	(0.3)	(74)	(0.1)	(53)	(0.1)	(5,359)	(7.0)	(76,518)	(100.0)
N. Carolina	1,500	17.9	4,696	56.1	1,326	15.8	229	2.7	288	3.4	305	3.6	21	0.3	8,365	100.0
Oregon	754	10.6	5,223	73.1	948	13.3	26	0.4	154	2.2	18	0.3	0	0.0	7,143	100.0
S. Carolina	120	14.1	531	62.2	35	4.1	9	1.1	126	14.8	30	3.5	3	0.4	854	100.0
Vermont	5	2.2	223	96.5	1	0.4	0	0.0	0	0.0	2	0.9	0	0.0	231	100.0
Washington	487	2.7	16,368	92.1	632	3.6	73	0.4	0	0.0	180	1.0	27	0.2	17,767	100.0
Total	121,004	22.2	337,051	61.9	53,502	9.8	–	–	2,917[4]	0.5	2,361	0.4	27,811	5.1	544,666	100.0

1. Included in the unknown category are 9,229 abortions which were performed by hysterotomy, hysterectomy, or a combination of any of the first 3 methods.
2. Abortions not reported for this category.
3. October 1971–September 1972.
4. Hysterotomy and hysterectomy
5. Numbers in each category based on data from 1972 certificates applied to 1972 total abortions estimated by New York City Health Department.

*All states with data available.

Table 16

REPORTED LEGAL INDUCED ABORTIONS, BY MENSTRUAL WEEK OF GESTATION AND STATE OF OCCURRENCE, SELECTED STATES,* 1972

State	≤8		9-10		11-12		13-15		16-20		21+		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Alaska	305	26.0	355	30.3	227	19.4	127	10.8	101	8.6	16	1.4	41	3.5	1,172	100.0
Arkansas[1]	384	48.4	236	29.8	90	11.3	33	4.2	48	6.1	2	0.3	0	0.0	793	100.0
California	43,584	31.4	41,877	30.2	25,421	18.3	12,280	8.9	9,675	7.0	1,248	0.9	4,499	3.2	138,584	100.0
Colorado[2]	562	10.7	1,042	19.8	1,020	19.4	824	15.7	846	16.1	146	2.8	820	15.6	5,260	100.0
Hawaii	1,651	36.3	1,391	30.6	739	16.3	388	8.5	255	5.6	54	1.2	69	1.5	4,547	100.0
Kansas[1]	4,213	34.4	4,169	34.0	2,522	20.6	821	6.7	477	3.9	38	0.3	8	0.1	12,248	100.0
Maryland[2,3]	1,997	22.0	2,420	26.6	1,755	19.3	775	8.5	2,022	22.2	124	1.4	0	0.0	9,093	100.0
Mississippi	15	24.6	16	26.2	13	21.3	4	6.6	7	11.5	3	4.9	3	4.9	61	100.0
New York Upstate	24,866	32.5	23,262	30.4	13,070	17.1	5,584	7.3	5,937	7.8	1,560	2.0	2,239	2.9	76,518	100.0
N. Carolina	2,171	26.0	2,047	24.5	1,524	18.2	1,003	12.0	1,100	13.2	168	2.0	352	4.2	8,365	100.0
Oregon	2,683	37.6	2,008	28.1	1,116	15.6	376	5.3	900	12.6	56	0.8	4	0.1	7,143	100.0
S. Carolina	293	34.3	252	29.5	145	17.0	83	9.7	25	2.9	8	0.9	48	5.6	854	100.0
Virginia[1,4]	1,363	30.3	955	21.2	469	10.4	442	9.8	1,093	24.3	70	1.6	104	2.3	4,496	100.0
Washington[3]	10,691	60.2	5,497	30.9	669	3.8	582	3.3	249	1.4	7	0.0	72	0.4	17,767	100.0
Total	94,778	33.0	85,527	29.8	48,780	17.0	23,322	8.1	22,735	7.9	3,500	1.2	8,259	2.9	286,901	100.0

1. Length of gestation is physician's estimate.
2. Numbers in each category are adjusted to add to annual total.
3. Length of gestation is fetal age.
4. Gestation of 15-16 weeks reported as one category. Single weeks (15 and 16) estimated and added to appropriate category for comparability.

*All States with comparable data available. New York City data provided in Table 17.

Table 17

REPORTED LEGAL ABORTIONS, BY MENSTRUAL WEEK OF GESTATION, NEW YORK CITY, 1972

≤ 12		13-15		16-20		21+		Unknown		Total	
No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
141,548	77.9	10,930	6.0	14,166	7.8	4,423	2.4	10,700	5.9	181,767	100.0

Source: Certificates of Termination.

Table 18

PERCENT OF REPORTED LEGAL ABORTIONS LESS THAN 13 MENSTRUAL WEEKS OF GESTATION, SELECTED STATES,* 1970-1972

	1970	1971	1972
State	Percent	Percent	Percent
Alaska		74.1	75.7
Arkansas		82.6	89.5
Colorado		66.0	49.9
Georgia	75.0	74.7	68.4
Hawaii	79.4[1]	81.3	83.2
Kansas		88.6	89.0
Maryland	58.5[2]	65.8	67.9
New York	77.0[2]	78.9	78.5
(City)	(78.4)[2,3]	(78.6)[3]	(77.9)[3]
(Upstate)	(72.0)[2]	(80.3)	(80.0)
N. Carolina		63.3	68.6
Oregon	65.5	74.3	81.3
S. Carolina	46.4[4]	69.1	80.8
Virginia		84.0	82.0
Washington		85.0	94.9
Overall Percent Less Than 13 Weeks Gestation	75.6	78.2	78.6
Percent Less Than 13 Weeks For The Six States With Data For 1970, 1971, and 1972	75.6	78.4	78.2

1. March 11 - December 31.
2. July - December.
3. Data from certificates filed.
4. February - December.

*All states with data available for at least 2 of the 3 years.

Table 19

INDICATION FOR ABORTION BY STATE OF OCCURRENCE
SELECTED STATES,* 1972

State	Mental Health		Physical Health		Risk of Fetal Deformity		Rape or Incest		Other		Unknown		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Alaska	11	0.9	57	4.9	1	0.1	9	0.8	1,067	91.0	27	2.3	1,172	100.0
Arkansas	603	76.0	158[1]	19.9	29	3.7	3	0.4	0	0.0	0	0.0	793	100.0
Colorado	4,774	90.8	129	2.5	10	0.2	49	0.9	0	0.0	298	5.7	5,260	100.0
Delaware	1,321	98.4	12	0.9	8	0.6	0	0.0	1	0.1	0	0.0	1,342	100.0
Georgia	220	8.8	55	2.2	24	1.0	8	0.3	2,199	87.6	3	0.1	2,509	100.0
Kansas	11,075	90.4	171	1.4	119	1.0	882	7.2	1	0.0	0	0.0	12,248	100.0
Maryland	8,794	96.7	211	2.3	20	0.2	22	0.2	46	0.5	0	0.0	9,093	100.0
Mississippi	30	49.2	17	27.9	0	0.0	1	1.6	3	4.9	10	16.4	61	100.0
N.Carolina	7,725[2]	92.3	576	6.9	26	0.3	29	0.3	0	0.0	9	0.1	8,365	100.0
Oregon[3]	6,997	95.7	216	3.0	61	0.8	29	0.4	6	0.1	0	0.0	7,309	100.0
S.Carolina	725	84.9	86	10.1	17	2.0	8	0.9	12	1.4	6	0.7	854	100.0
Virginia	4,297	95.6	104	2.3	28	0.6	5	0.1	62[4]	1.4	-[4]	-	4,496	100.0
Total	46,572	87.0	1,792	3.3	343	0.6	1,045	2.0	3,397	6.3	353	0.7	53,502	100.0

1. Includes 17 with both physical and mental indications.
2. Socioeconomic and maternal mental health are combined into 1 category.
3. More than 1 indication was reported for approximately 2% of the state's 7,143 women undergoing legal abortions.
4. Other and unknown reported as 1 category.

* All states with data available.

Table 20

COMPLICATION RATES IN PATIENTS WHO UNDERWENT SECOND TRIMESTER ABORTIONS INDUCED BY SUPER COILS VERSUS SALINE-AMNIOTIC FLUID EXCHANGE

Method	Number of Patients	Complication Rate per 100 Major	Complication Rate per 100 Total
Super Coil*	15	20.0	60.0
Saline-Amniotic Fluid Exchange	5,973	2.6	27.9

*Assumes no complications following discharge from clinic for 2 women for whom complete follow-up data were not available.

Source: Center for Disease Control: Morbidity and Mortality Weekly Rep. (22) 18: 159-160, 1973, May 5.

Table 21

INCIDENCE OF HEMORRHAGE OCCURRING AFTER DELIVERY OF THE FETUS ASSOCIATED WITH SALINE-AMNIOTIC FLUID EXCHANGE, PARK EAST HOSPITAL, NEW YORK CITY, JULY - DECEMBER, 1972

Interval from Delivery of Fetus to Delivery of Placenta (Minutes)	Elective Removal of Placenta Not Performed* (N=1,733) Hemorrhage Rate per 100	Elective Removal of Placenta Performed (N=374) Hemorrhage Rate per 100
0	2.7 (13/485)	Not applicable
1-60[1]	5.8 (39/669)	7.2 (5/69)
61+[2]	16.2 (94/579)	3.0** (9/305)
Total[2]	8.4 (146/1,733)	3.7** (14/374)

1. $X^2 = .224$ $P > .50$
2. $X^2 = 47.34$ $P < .001$

*Spontaneous delivery or indicated removal of placenta.
**These rates are falaciously lowered by removal from the "elective" group of women who hemorrhaged and then had "indicated" removal.

Table 22

MAJOR CATEGORIES OF ABORTION LAW

UNITED STATES – JANUARY 1, 1973

MAJOR CATEGORIES OF STATE ABORTION LAWS	STATES HAVING SIMILAR ABORTION LAWS
I. Abortion allowed only when necessary to preserve the life of the pregnant woman	Arizona, Connecticut,[1] Idaho, Illinois[2], Indiana, Iowa[3], Kentucky, Louisiana[4], Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, West Virginia, Wyoming
II. Indications for legal abortion include threats to the pregnant woman's life and forcible rape	Mississippi
III. "Unlawful" or "unjustifiable" abortions are prohibited	Massachusetts[5], New Jersey[6], Pennsylvania
IV. Abortions allowed when continuation of the pregnancy threatens the woman's life or health	Alabama, District of Columbia, Vermont[7]
V. American Law Institute Model Abortion Law; "A licensed physician is justified in terminating a pregnancy if he believes that there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest or other felonious intercourse"	Arkansas, Colorado, Delaware, Florida, Kansas[8], Maryland (does not include incest), New Mexico, North Carolina, South Carolina, Virginia
VI. Abortion law based on the May 1968 recommendations of the American College of Obstetricians and Gynecologists. Allows abortion when the pregnancy resulted from felonious intercourse, and when there is risk that continuance of the pregnancy would impair the physical or mental health of the mother. "In determining whether or not there is substantial risk (to the woman's physical or mental health), account may be taken of the mother's total environment, actual or reasonably foreseeable"	Oregon
VII. No legal restrictions on reasons for which an abortion may be obtained prior to viability of the fetus.	Alaska, Hawaii, New York, Washington
VIII. Legal restrictions on reasons for which an abortion may be obtained were invalidated by court decision.	California, Georgia, Texas, Wisconsin

[1] In *Abele v. Markle*, 342 F Supp 800 (D. Conn. 1972), a U.S. District Court struck down the Connecticut law as an unconstitutional violation of privacy. Five weeks later a new law was enacted which was similar to the first, except that it contained a preamble declaring the intent of the legislature to protect human life from the moment of conception. This law was also struck down by a decision of the same U.S. District Court, 351 F Supp 224 (D. Conn. 1972). That order was stayed, however, by the United States Supreme Court, 93 S.Ct. 212 (1972) thus restoring the Connecticut law until the Supreme Court could rule.

[2] A federal District Court decision, *Doe v. Scott*, 321 F Supp 1385 (N.D. Ill., Jan. 29, 1971), holding the Illinois Abortion Statute unconstitutional has been stayed pending appeal in the United States Supreme Court.

[3] In *State v. Dunklebarger*, the Iowa statute which is couched in terms of saving the life of the woman, has been interpreted to suggest that preservation of health is sufficient. 221 N.W. 592 (Iowa, 1928)

[4] Although the Louisiana Abortion Statute does not contain an express exception to the "crime of abortion," the Louisiana Medical Practice Act authorizes the Medical Board to suspend or institute court proceedings to revoke a doctor's certificate to practice medicine in the state when the doctor has procured or aided or abetted in the procuring of an abortion "unless done for the relief of a woman whose life appears imperiled after due consultation with another licensed physician." La. Rev. Stats.Ann.37:1261.

[5] The statutory terms have been interpreted to permit abortion to save the woman's life or to prevent serious impairment of physical or mental health. *(Com. v. Wheeler*, 53 N.E. 2d 4 (Mass. 1944)).

[6] On February 29, 1972, a U.S. District Court ruled in the case of *Young Women's Christian Association of Princeton, N.J. v. Kugler*, 342 F Supp 1048 (D.N.J. 1972) that the New Jersey Statute was in violation of the First, Ninth, and Fourteenth Amendments. However, the state appealed the ruling, and the U.S. Court of Appeals for the Third Circuit has ruled that the District Court Decision applies only to the physicians who brought the original suit. (Per Curiam, June 14, 1972).

[7] On January 14 and February 8, 1972, the Vermont Supreme Court in the case of *Beecham v. Leahy*, 287 A 2d 836(1972) ruled that the Vermont law which prohibited abortion except to save the life of the mother, was discriminatory in that it denied abortion where threats to health, short of threat to life, were involved. The Vermont Attorney General then issued guidelines in which he stated his opinion that the law had been broadened to permit abortion within the first trimester in case of threat to a woman's physical or mental health.

[8] A U.S. District Court in Kansas ruled unconstitutional those provisions of the state abortion law requiring that hospitals performing abortion be accredited by the Joint Commission on Accreditation of Hospitals and that abortion be approved by 3 physicians. *(Poe v. Menghini* 39 F Supp. 986 (D. Kan. 1972)).

FIGURE 1 RATIOS OF REPORTED LEGAL ABORTIONS TO LIVE BIRTHS, BY STATE OF RESIDENCE, JANUARY-DECEMBER 1972

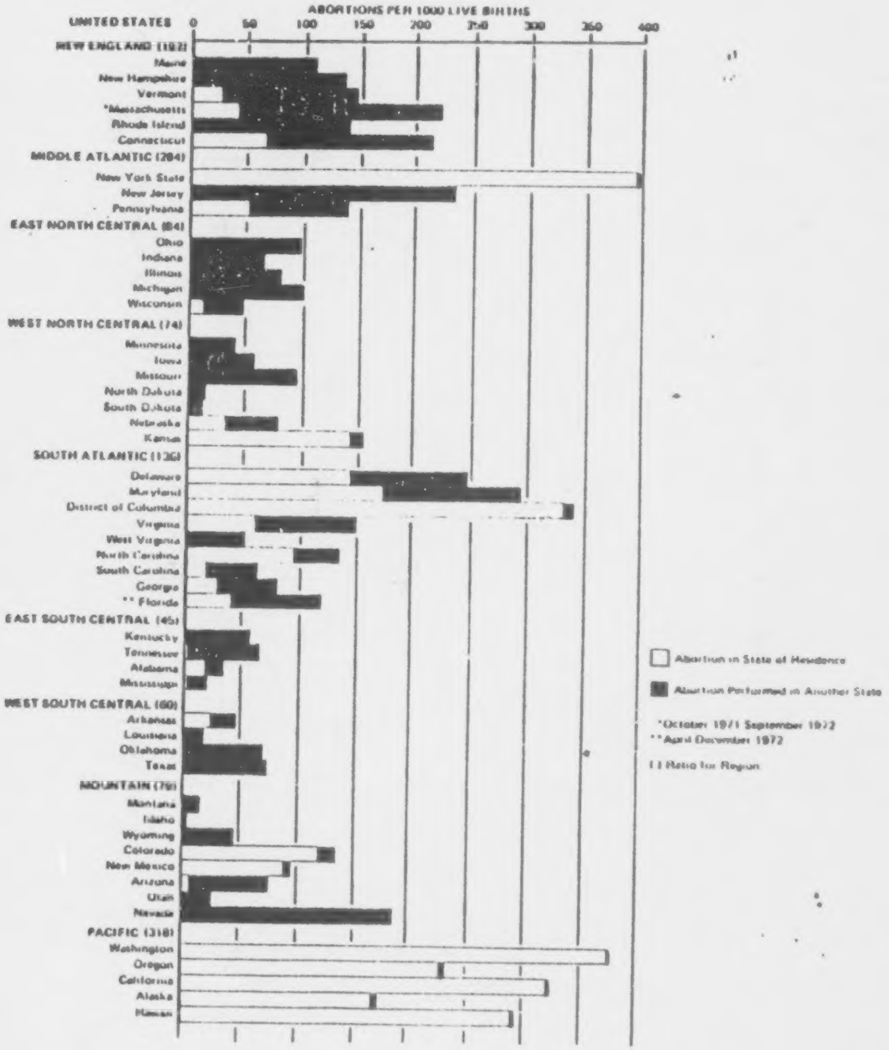
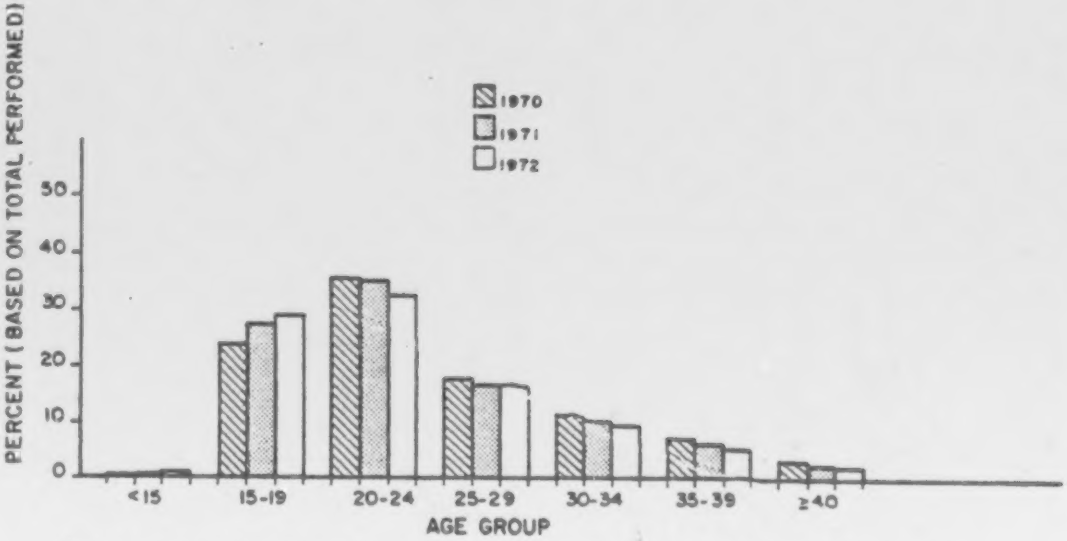
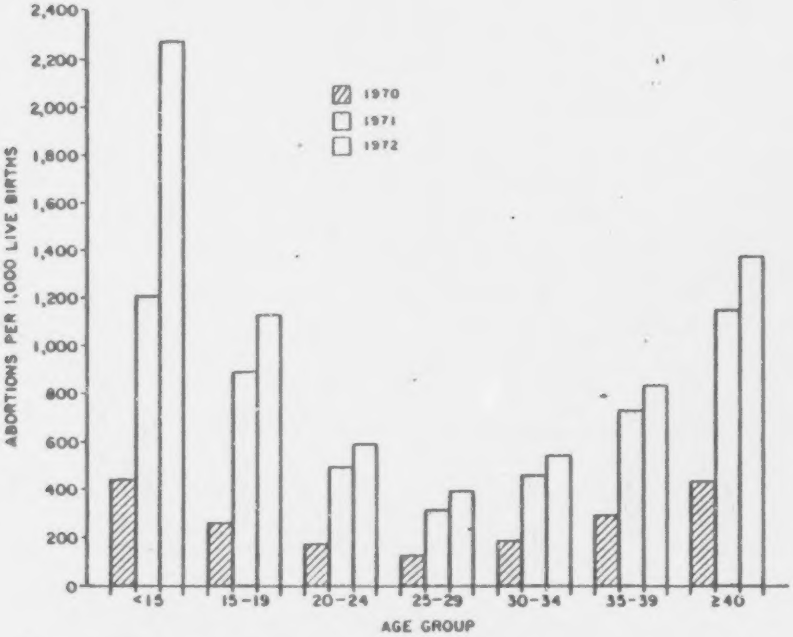


Fig. 2 PERCENT DISTRIBUTION OF REPORTED LEGAL ABORTIONS, BY AGE GROUP, SELECTED STATES* 1970-1972



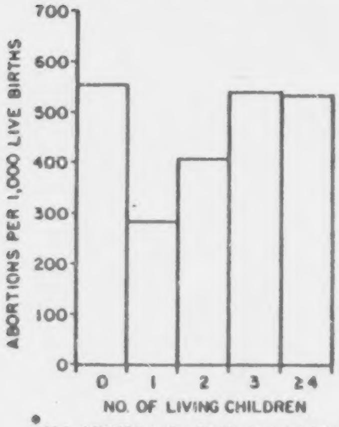
*ALASKA, COLORADO, DELAWARE, GEORGIA, HAWAII, NEW YORK, OREGON, SOUTH CAROLINA

Fig. 3 AGE-SPECIFIC LEGAL ABORTION RATIOS, SELECTED STATES,* 1970 – 1972



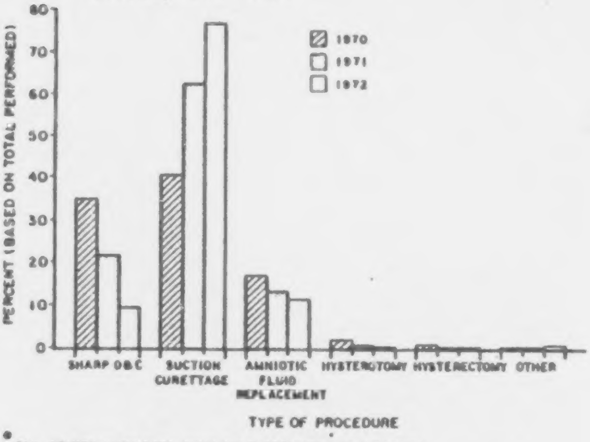
*ALL STATES WITH DATA AVAILABLE FOR 1970, 1971 AND 1972: ALASKA, COLORADO, DELAWARE, GEORGIA, HAWAII, NEW YORK, OREGON, AND SOUTH CAROLINA

Fig. 4 ABORTION TO LIVE BIRTH RATIO, BY NUMBER OF PREVIOUS LIVE BIRTHS, SELECTED STATES,* 1972



*ALL STATES WITH DATA AVAILABLE (13 STATES)

Fig. 5 PERCENT DISTRIBUTION OF REPORTED LEGAL ABORTIONS, BY TYPE OF PROCEDURE, SELECTED STATES,* 1970-1972



*ALL STATES WITH DATA AVAILABLE FOR 1970, 1971 AND 1972:
ALASKA, GEORGIA, MARYLAND, NEW YORK, OREGON AND SOUTH CAROLINA

[illegible]

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U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE

from ADVANCES IN PLANNED PARENTHOOD, Vol. XII, No. 3, 1978

Abortion as a treatment for unwanted pregnancy: the number two sexually-transmitted condition*

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Abstract

Using data from national surveys of reproductive behavior, we estimated that unwanted pregnancy was the second most prevalent sexually-transmitted condition in the country in 1974; gonorrhea was the first. For women who wish to terminate their unwanted pregnancies, the preferred approach is legal abortion by suction curettage. This procedure compares favorably in efficacy and safety with the available treatment for other sexually-transmitted conditions.

Basándonos en datos nacionales relacionados con el comportamiento en el área de la reproducción, hemos podido determinar que durante el año 1974 el embarazo no deseado fué, en frecuencia, la segunda condición más común de transmisión sexual; la gonorrhea fué la primera. El tratamiento de elección para el embarazo no deseado es el aborto legal mediante la succión durante el primer trimestre del embarazo. La morbilidad y mortalidad de este procedimiento se compara favorablemente en cuanto a su eficacia y grado de seguridad con los tratamientos de que se dispone para las otras condiciones de transmisión sexual.

Introduction

Sexually-transmitted diseases are currently epidemic in the United States (1). In 1974 there were almost 900,000 reported cases of gonorrhea and about one-tenth that number of syphilis (2). During the same year, unwanted pregnancies were also epidemic. To provide epidemiologic perspective on this problem, we will consider unwanted pregnancy as a sexually-transmitted condition, estimate its incidence in the United States, and compare the treatment of unwanted pregnancy with that for gonorrhea.

Unwanted pregnancy as a sexually-transmitted condition

Although rarely classed as a venereal disease, unwanted pregnancy is transmitted

etc.

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* Presented at the 14th Annual Scientific Meeting of the Association of Planned Parenthood Physicians, Miami Beach, Florida, November 11–12, 1976. The opinions or assertions contained herein are the private views of the authors and are not to be construed as official or as reflecting the views of the Department of Health, Education, and Welfare.

sexually, is socially and emotionally pathologic (3), and has many other characteristics of the conventional venereal diseases. The incubation time, defined as the period between exposure (mid-cycle coitus) and the development of initial symptoms (usually missed menses), averages approximately 2 weeks. As with sexually-transmitted diseases, there appears to be intrafamilial predisposition to unwanted pregnancy (3). Moreover, 10% recurrence rate has been reported (4), and prevention is more effective if simultaneous treatment of sexual partners is undertaken through contraceptive counseling (5).

As with other sexually-transmitted conditions, unwanted pregnancy occurs primarily in the most sexually-active age groups. Both unwanted pregnancies and venereal diseases seem to have seasonal variations (6). Finally, the barrier methods used to prevent unwanted pregnancy also serve to prevent venereal diseases (7).

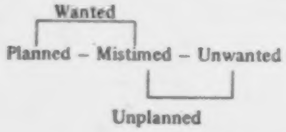
Incidence of unwanted pregnancy

Having suggested that unwanted pregnancy be considered a sexually-transmitted condition, what do we know about its epidemiology? One way of determining the in-

TABLE I.
Percentage of births unwanted, mistimed, and/or unplanned from studies of reproductive behavior, by marital status

Study	Region	Date	Marital status	Percentage of births		
				Mistimed (1)	Unwanted (2)	Unplanned (3)=(1)+(2)
NFS[1]	National	1966–70	Married	29	14	43
Albany[2,3]	Albany	1969–74	Married	27	14	41
			Unmarried	74	5	79
Teen-agers[4]	National	1971	Unmarried	–	–	78
Hawaii[5]	Hawaii	1970–71	Married	–	–	39
			Unmarried	–	–	73
Atlanta[6]	Atlanta	1966–71	Married	–	–	36
National natality study (NCHS)[7]	National	1968	Married	28	13	41
		1969	Married	26	12	38
		1972	Married	27	8	35

Definition



[1] Westoff CF: The decline of unplanned births in the United States. Science 191:38–45, 1976

[2] Anderson JE, Morris L, Geshe M: Planned and unplanned fertility in upstate New York. Fam Plann Perspect 9:4–11, 1977

[3] Morris L: Sexual activity, contraceptive usage, and source of contraception among never married women: Albany (NY) Health Region. Presented at the Annual Meeting of the Population Association of America. Montreal, Canada, April, 1976

[4] Zelnik M: Personal communication, July 15, 1975

[5] Steinhoff PG, Palmore JA, Smith RG, et al: Pregnancy planning in Hawaii. Fam Plann Perspect 7:138–142, 1975

[6] Anderson JE, Smith JC: Planned and unplanned fertility in a metropolitan area: Black and white differences. Fam Plann Perspect 7:281–285, 1975

[7] Weller RH: Number and timing failures among legitimate births in the United States: 1968, 1969, and 1972. Fam Plann Perspect 8:111–116, 1976

cidence of unwanted pregnancy is to extrapolate data from surveys about reproductive behavior (Table I). When stratified by marital status, these studies demonstrate remarkably similar percentages of mistimed, unwanted, and unplanned pregnancy, especially considering the multiple differences among regions studied, dates covered, populations interviewed, and questions used. For example, marital unplanned pregnancy ranged from 35–43%, while unmarried unplanned births ranged from 73–79%. Although most of these studies have concentrated on unplanned or unintended pregnancy, for our estimates we will focus only on unwanted births, defined as failures in "number" rather than "timing". Therefore, our data probably tend to underestimate the true incidence of undesired pregnancy.

The 1970 National Fertility Study revealed that between the years 1966 and 1970 14% of births to married women were unwanted (8). The Albany Area Survey of 1974 found the same percentage of marital unwanted pregnancy in the years 1969-1974 (9). On the other hand, the National Natality Study of 1972 determined that only 8% of marital births that year were unwanted (10); differences in how the questions were asked may have accounted for the discrepancy between the studies.

Because the surveys dealt primarily with the years prior to 1974, they are outdated for our current estimates. Using a linear extrapolation from the 1969 and 1972 National Natality Study, adjusted for birth order, we estimate conservatively that about 6.7% of births to married women in 1974 were unwanted (11), for a total of 185,300 (Table II).

Unwanted births also occur to unmarried women. The Albany Survey determined that 5% of out-of-wedlock births were unwanted; another 74% of births were unplanned (12). If the conservative 5% figure is applied to the out-of-wedlock births in 1974, an additional 20,900 births can be estimated to have been unwanted among unmarried women, for a total of 206,200 unwanted births. If we assume that each unwanted birth equals 1 unwanted pregnancy, there were at least 206,200 unwanted pregnancies in 1974. However, this estimate takes into account only births and does not include those unwanted pregnancies that were terminated prior to a birth.

The best available indicator of unwanted pregnancies not resulting in birth is the annual incidence of legally-induced abortion in this country. Although many abortions,

TABLE II

Estimated number of unwanted pregnancies, reported gonorrhea, and reported syphilis – United States, 1974

Category	Number of births[1]	Number of births, unwanted	Estimated number of unwanted pregnancies
In-wedlock	2,741,900	185,300 (7%)[2]	
Out-of-wedlock	418,100	20,900 (5%)[3]	
Legal induced abortions			763,500[4]
TOTAL		206,200	969,700
Reported gonorrhea – 1974			898,900[5]
Reported syphilis – 1974			83,800[5]

[1] National Center for Health Statistics: Final Natality Statistics – 1974. Monthly Vital Statistics Report 24:11, Supplement, February 13, 1976. All numbers rounded to nearest 100.

[2] Weller RH: Number and timing failures among legitimate births in the United States: 1968, 1969, and 1972. Fam Plann Perspect 8:111–116, 1976. Estimate of unwanted in-wedlock births for 1974 from parity-adjusted linear extrapolation of 1969 and 1972 data by John E. Anderson.

[3] Morris L: Sexual activity, contraceptive usage, and source of contraception among never married women: Albany Health Region. Presented at the Annual Meeting of the Population Association of America, Montreal, Canada, April, 1976

[4] Center for Disease Control: Abortion Surveillance – 1974, issued April 1976

[5] Center for Disease Control: Morbidity and Mortality Weekly Report, Annual Supplement – 1974, 23(53), July, 1975

especially those to unmarried women, terminate pregnancies resulting from failures in timing rather than number, we will consider them as operationally unwanted for the purposes of estimation. In 1969, the Center for Disease Control (CDC) initiated national surveillance of legal abortion. CDC's data come from the central health agencies in most states and from individual hospitals and clinics in those states without reporting systems (13). Nearly 763,500 legal abortions were reported to CDC by these sources in 1974. This number of reported abortions was probably less than the actual number performed. A nationwide survey of abortion facilities by the Alan Guttmacher Institute (AGI) found that an estimated 900,000 abortions had been performed during 1974 (14). In public health surveillance, survey data and reported cases frequently differ, with the reported cases reflecting a lower number.

As shown in Table II, when the smaller CDC figure of 763,500 abortions in 1974 is added to the estimate of unwanted pregnancies based on birth data, a total number of 969,700 unwanted pregnancies can be estimated for the United States during that year. We emphasize that this represents only a crude minimum estimate of unwanted pregnancy because: we used the most conservative percentages from surveys of unwanted fertility; we did not consider mistimed births, but dealt only with births in excess of the desired number; as emphasized above, we used only the reported number of abortions and not the more realistic estimate by the AGI of the actual number performed; and we made no upward adjustment for those unwanted pregnancies terminated by spontaneous abortion.

How does the estimate of unwanted pregnancy compare with the incidence of sexually-transmitted diseases? In 1974, 898,000 cases of gonorrhea were reported to CDC; thus, even our conservative estimate of unwanted pregnancy is over 70,000 cases higher than that for gonorrhea (Table II). However, because of the large amount of underreporting which occurs with gonorrhea, a more likely estimate of the total number of gonorrhea cases for 1974 is in the 2 million range (1). Therefore, figuring conservatively, unwanted pregnancy appears to be the second most prevalent sexually-transmitted condition in our country.

One important qualification should be made. Several sexually-transmitted infections are not routinely reported to public health authorities. Such conditions as nongonococcal urethritis and salpingitis and vaginal trichomoniasis are sexually transmitted (15), but no reporting system exists for them. Therefore, it is not possible to estimate accurately the incidence of these diseases within the United States. Authorities have suggested that each of these conditions involves more individuals than individuals with gonorrhea (1, 15). Nevertheless even if inclusion of other sexually-transmitted diseases lowers the ranking of unwanted pregnancy, the absolute magnitude of this condition throughout the nation remains remarkably high.

Treatment of unwanted pregnancy

What about the outcome of unwanted pregnancy? Without treatment, the natural history of unwanted pregnancy involves either a spontaneous abortion or a term delivery. Approximately 1 in 6 of all pregnancies will spontaneously abort, most in the first 2 months (16). If the pregnancy is unwanted and carried to term, the mother is often faced with the difficult choice of either keeping the child or putting it up for adoption. Moreover, term birth carries risks of morbidity (17) and mortality (18). The risk of death from term birth is 9 times greater than the risk associated with first-trimester abortion (13).

For women who want to end an unwanted pregnancy, the preferred approach is legal abortion by suction curettage during the first trimester. In 1974, the typical woman choosing abortion was young, white, and unmarried (13). Pregnancy terminations for females under 20 years of age comprised almost one-third of all abortions; the 20- to 24-year-old age group accounted for another one-third, and the other one-third were 25 years of age or older. The age-specific abortion ratios indicate that pregnant women less than 19 and over 40 were more likely to have abortions than women of other ages, averaging 1.2 abortions for every 2 live births. This is a function of the large number of unwanted pregnancies occurring at both ends of the reproductive age spectrum.

Between 1972 and 1974, the percentage

of abortions obtained by women of races other-than-white increased from 23% to 30%. This changing distribution continues the trend noted since 1971 which may indicate the increasing availability of abortion for the other-than-white population.

In 1974, the distribution of abortions by marital status and number of living children was very similar to the pattern for previous years. Over two-thirds of the women were in the unmarried category, which includes women who are widowed, separated, or divorced and women who have never married. Nearly 50% of abortions were performed on women with no living children.

There is a definite geographic variation among patients treated by legal abortion, when analyzed both by the state where the abortion occurred and the state of residence. In 1974 all 50 states and the District of Columbia reported that abortions had been performed within their boundaries. As in the past several years, New York and California were the largest providers of abortion in 1974, accounting for 39% of all reported procedures. However, because the Supreme Court decisions of 1973 led to a redistribution of abortion services, the combined percentage for these 2 states has declined markedly over the last 2 years. As expected, fewer women tended to get abortions outside their state of residence as availability of abortion services increased in their own states. In 1974, 13% of women went out-of-state to obtain an abortion, compared with 44% in 1972.

The overwhelming majority of women obtaining legal abortion for unwanted pregnancy are having it performed by the preferred approach – legal abortion by suction curettage. In 1974, 78% of all abortion procedures were performed by suction curettage, 12% by sharp curettage, 8% by saline instillation procedures, and only 0.6% by hysterotomy or hysterectomy. Moreover, 8 of 9 women who obtained abortions did so prior to 13 menstrual weeks' gestation. Thus, it appears that for the nation as a whole, women who choose abortion when faced with an unwanted pregnancy are obtaining the preferred medical treatment.

Legal abortion and penicillin as treatments for sexually-transmitted conditions

When evaluating any therapy, the 2 main criteria are effectiveness and safety. Therefore, it is important to consider these factors for legal abortion. Just how effective and safe is first-trimester suction curettage?

TABLE III
Comparison of legal abortion and penicillin as treatments for sexually-transmitted conditions

	Legal abortion for unwanted pregnancy	Penicillin for gonorrhea
Method of treatment	Suction curettage at < 13 weeks' gestation	Intramuscular procaine penicillin
Efficacy (failure rate)	0.3%[1]	3.2%[2]
Morbidity		
minor	5.0%[1]	0.3–10%[3,4]
major	0.4%[1]	0.001–0.04%[3,4]
Mortality	1.8/100,000[1]	1.4–2.0/100,000[3,4]
Cost/treatment	$186[5]	$17.70[6]

[1] Center for Disease Control: Abortion surveillance – 1974, issued April, 1976

[2] Kaufman RA, Johnson RE, Jaffe HW, et al: National gonorrhea therapy monitoring study: Treatment, results. N. Engl J Med 294:1–4, 1976

[3] Idsoe O, Guthe T: Nature and extent of penicillin side-reactions with particular reference to fatalities from anaphylactic shock. Bull WHO 38:159–188, 1968

[4] Rudolph AH, Price EV: Penicillin reactions among patients in venereal disease clinics. JAMA 223:499–501, 1973

[5] American Civil Liberties Union Foundation: Abortion Clinic Directory. New York, October, 1975. Number represents the mean cost of suction curettage from clinics listed in the directory.

[6] Venereal Diseases Division, Center for Disease Control: Personal communication, October, 1976

To put this question into some perspective, we compare first-trimester abortion as a treatment for unwanted pregnancy with intramuscular penicillin as a treatment for gonorrhea (Table III). Based on results from 2 multicenter prospective studies of abortion complications, the first conducted by the Population Council in 1970 and 1971 (19) and the second by CDC in 1971-1975 (13), first-trimester suction abortion has a failure rate of 0.3% or 3 per 1,000 procedures. This contrasts with a 3.2% failure rate or 32 per 1,000 cases for intramuscular penicillin in treating gonorrhea (20). Thus, abortion is 10 times more effective for treating unwanted pregnancy than penicillin is for treating gonorrhea.

Comparison of the safety of these 2 therapeutic entities is also revealing. Suction abortion, a surgical procedure employing either local or general anesthesia, would be expected to hold more dangers than the ubiquitous penicillin, an antibiotic of low toxicity. However, suction curettage has a 5% total-complication rate and a 0.4% major-complication rate (13). Penicillin, on the other hand, causes mild allergic manifestations in 0.7%—10% of cases and leads to severe anaphylactic reactions in 0.001–0.04% of patients treated (21, 22).

Moreover, the risks of death from abortion and intramuscular penicillin are also similar. The death-to-case rate for first-trimester suction curettage is 1.8 per 100,000 abortions (13) compared with the World Health Organization and CDC estimates of 1.4–2.0 deaths per 100,000 patients treated with intramuscular penicillin (21, 22). Therefore in terms of morbidity and mortality risks for the 2 treatments, abortion compares favorably with penicillin.

Although suction curettage is more efficacious than, and as safe as, penicillin, it costs more. The average cost per patient treated with suction abortion is roughly 10 times higher than the per-patient cost of gonorrhea treated with penicillin (Table III). However, case-finding costs are not included in the penicillin-treatment estimates, and thus the penicillin costs are minimum figures. Moreover, although legal abortion is more expensive than penicillin, it is less costly than the non-treatment of unwanted pregnancy, usually a term birth. Thus, the cost-benefit ratio of legal abortion is probably favorable (23).

In summary, unwanted pregnancy is the second most prevalent sexually-transmitted condition in this country. Women who have had legal abortion as a treatment of unwanted pregnancy are more likely to be young, white, and unmarried. Eight of 9 women have had their abortions in the first trimester, a time when the risk of death from the procedure is similar to that of penicillin for gonorrhea. Therefore, we conclude that unwanted pregnancy should be considered a sexually-transmitted condition of epidemic proportion; moreover, legal abortion is an effective, safe, curative treatment for that condition.

Acknowledgments

We acknowledge the following individuals for their contributions to this paper: John E. Anderson, Ph.D., Leo Morris, M.S., William Darrow, Ph.D., Roger W. Rochat, M.D., Susan Barnes, and Loraine S. Good.

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Illegal Abortions in the United States: 1972-1974

By Willard Cates, Jr., and Roger W. Rochat

Because illegal abortion is a clandestine procedure, it has been impossible to get the direct information needed to determine whether, or to what extent, the Supreme Court's 1973 abortion decisions have resulted in the reduction of criminal abortions. Earlier estimates of incidence have been based on local surveys[1] or were derived from such measures as deaths and hospitalizations that resulted from illegal abortions.[2]

In this article, national statistics are

Legalization of abortion has been accompanied by a sharp decline in abortion deaths—almost entirely due to the drop in illegal abortion deaths, from 39 in 1972 to just three in 1975. It is estimated that the annual number of illegal abortions has declined from about 130,000 to 17,000 over the same period.

presented that show for the first time the trends in mortality associated with illegal abortion over the three-year period (1972-1974) surrounding the Supreme Court decisions, as well as the characteristics of those women whose deaths were associated with illegal abortions during this period. Finally, an estimate is made of the total number of illegal (nonphysician) procedures performed in the United States in each of the three years—calculated from an index based on the number of illegal abortion deaths in each year—thus measuring indirectly the effect of legalization of abortion on the incidence of illegal abortion.

Methods

The Center for Disease Control (CDC) in 1972 initiated its national surveillance of abortion deaths in order to obtain current, comprehensive and specific information on abortion-related mortality. Monthly reports of abortion deaths have come primarily from state health departments; additional information has been received from state hospitals and medical associations, CDC special studies, published case histories, and records from other federal agencies. After receiving each report, CDC contacts state health department investigators or the attending physician to verify or clarify details about the case history. CDC updates the number of abortion deaths as reports are received. Reporting delays have averaged five months, ranging from one to 35 months. Data presented in this article supersede information contained in earlier CDC publications.

Abortions associated with mortality are classified as spontaneous or induced, based on information from medical interviews with and physical examination of the patient; information from family, friends or others about presenting symptoms; and surgical or pathologic evidence of previous instrumentation. If it is not possible to determine whether the abortion was spontaneous or induced, it is classified as "unknown."

Induced abortions are further classified as "legal" or "illegal" by the following criteria:

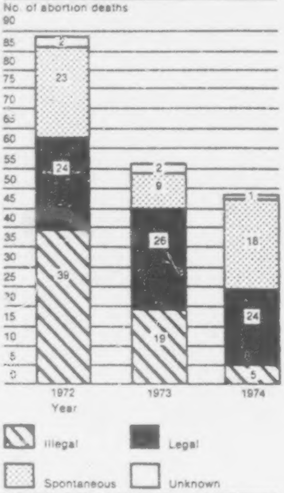
- If the patient's medical history indicates that the abortion was self-induced or that it was induced by someone who was not acting under the immediate supervision of a licensed physician, it is classified as "illegal."
- If evidence of instrumentation is found but no history of physician-induced abortion is indicated, the classification is "illegal."
- If the patient's medical history indicates that the abortion was performed or supervised by a physician, it is classified as "legal."[*]

Abortion Deaths

As may be seen in Figure 1, the *total* number of abortion deaths in the United States declined from 88 in 1972 to 56 in 1973 to 48 in 1974. Eighty-five percent of the decline is due to the fact that fewer women are dying from illegal (i.e., nonphysician) abortions. Such deaths declined from 39 to 19 to five over the three-year period (and, based on preliminary reports, to just 3 in 1975); deaths related to legal abortions remained stable and deaths associated with spontaneous abortions showed no meaningful trend. In no month following the Supreme Court decisions were more than two deaths associated with illegal abortion reported; whereas in every month but one prior to the Court decisions, there were at least three such deaths.

As Table 1 shows, women whose deaths were associated with illegal abortions during the period following the 1973 Supreme Court decisions were more likely to be older and to be nonwhite[†] than those who died in 1972. Over the three-year period, the median age of women whose deaths were associated with illegal procedures increased from 24 to 27, and the proportion of nonwhite women among those who died increased from 64 percent to 80 percent. By contrast, there was no trend in the median length of gestation, which ranged from 12.2 to 13.6 weeks over these years.

Figure 1. Abortion-related mortality, by category, United States, 1972-1974



The illegal abortion mortality ratio averaged 6.6 deaths per million live births per year and the rate averaged 0.5 deaths per million women of reproductive age (see Table 2). The age-specific mortality ratios for the five-year age groups between 15 and 40 were remarkably similar

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[*] These criteria conform with the 1973 Supreme Court decisions on abortion, which stipulate that the only legal restriction that may be imposed on first-trimester abortions is that the procedure be performed by or under the direction of a licensed physician. In order to compare abortion deaths in 1972 with those in 1973-1974, we classified those deaths which occurred in 1972 according to the criteria enunciated by the Supreme Court. That is, if a woman died after a physician-induced abortion in 1972 in a state with restrictive abortion legislation, we classified this abortion as legal even though the procedure violated state law at the time.

[†] "Black and other" races in tables.

Table 1. Selected characteristics of U.S. women whose deaths were associated with illegal abortions, by year, 1972-1974

Characteristic	Deaths							
	Total		1972		1973		1974	
	No	%	No	%	No	%	No	%
Total	**63**	**100.0**	**39**	**100.0**	**19**	**100.0**	**5**	**100.0**
Age								
15-19	11	17.5	8	20.5	3	15.8	0	0.0
20-24	22	34.9	15	38.5	6	31.6	1	20.0
25-29	18	28.6	9	23.1	5	26.3	4	80.0
30-34	5	7.9	3	7.7	2	10.5	0	0.0
35-39	3	4.8	2	5.1	1	5.3	0	0.0
≥40	4	6.3	2	5.1	2	10.5	0	0.0
Median	24.7		23.8		25.5		26.9	
Range	15-45		15-45		16-41		21-29	
Race								
White	19	30.2	14	35.9	4	21.1	1	20.0
Black and other	44	69.8	25	64.1	15	78.9	4	80.0
Gestation (weeks)			N: 39					
≤8	2	3.2	2	5.1	0	0.0	0	0.0
9-10	13	20.6	8	20.5	4	21.1	1	20.0
11-12	13	20.6	9	23.1	2	10.5	2	40.0
13-15	8	12.8	3	7.7	5	26.3	0	0.0
16-20	14	22.2	9	23.1	3	15.8	2	40.0
≥21	0	0.0	0	0.0	0	0.0	0	0.0
Unknown	13	20.6	8	20.5	5	26.3	0	0.0
Median	12.6		12.2		13.6		12.5	
Range	6-20		6-20		9-20		10-20	

—ranging from 4.5 to 7.8; but the ratio for women 40 and older was about six times higher—38.8—than the ratio for women 15-39. The difference in race-specific mortality was much greater. Among nonwhites, 25 deaths were associated with illegal abortion for every million live births—some 10 times higher than the ratio for whites. The racial differential in mortality rates (where the number of women aged 15-44 is the denominator) is even more striking: 2.4 deaths per million compared to 0.2—a 12-fold difference. The age-specific rates were highest among women 20-29, the period when fecundity is greatest and most wanted childbearing occurs.

Over the three years, the District of Columbia and Texas had the nation's highest illegal abortion ratios and rates (62 and 21 deaths per million live births, and 3.7 and 1.8 deaths per million women 15-44, respectively). Texas and New York accounted for the largest absolute numbers of illegal abortion deaths—14 (22 percent) and 11 (17 percent) of the total of 63 deaths reported in the United States over the three years. (In both states, deaths associated with illegal abortion declined during the three-year period, from eight to one in Texas, and from 10 to zero in New York.) As may be seen in Figure 2, deaths associated with illegal abortions were concentrated in the eastern half of the country. Only two deaths, one in California and one in Oklahoma, occurred in states to the north and west of Texas.

Table 3 compares the characteristics of women whose deaths were associated with illegal abortions with those of women whose deaths were related to legal procedures and with the characteristics of all women who obtained legal abortions over the 1972-1974 period. Over the three years, women whose deaths were associated with illegal abortions were older on average (median = 24.7) than those whose deaths were related to legal procedures (23.7), and older than all reported legal abortion patients (22.7). Seven in 10 of those who died from causes relating to illegal procedures were nonwhite, compared to about half of those whose deaths were related to legal abortions, and fewer than three in 10 of all abortion patients. Women who died after illegal abortions had pregnancies that were more advanced than those of the average legal abortion patient (a median of 12.6 weeks compared to 10.2 weeks), but less advanced than those of women who died after legal abortions (median = 15.2 wks.). Over the three years, only two (three percent) of the 63 deaths following illegal abortions were performed outside the woman's state of residence, compared with 13 (18 percent) of the 74 deaths associated with legal abortions and 22 percent of all legal abortions throughout the country.

An Illegal Abortion Death

The case history of a recent death from illegal abortion, which occurred after the 1973 Supreme Court abortion decisions, is illustrative:

> A 21-year-old pregnant black female, gravida 2, para 1, last menstrual period 4 months before, was informed by her local physician that she was 14 weeks pregnant. She requested an abortion, but local facilities for terminating a second-trimester pregnancy were not available. She was given the name of an out-of-state hospital which performed second-trimester abortions, but after considering the expense and inconvenience of obtaining such a procedure, she said that she would continue the pregnancy and began prenatal care. She was next seen six days later in the emergency room of a local community hospital, where she was treated for shock fol-

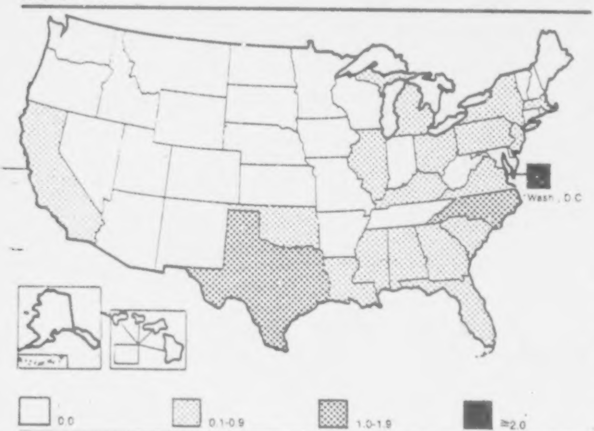
Table 2. Average annual ratio of illegal abortion deaths per million live births, and rate per million women aged 15-44, by age and race, 1972-1974

Characteristic	Illegal abortion deaths	Ratio	Rate
Total	**63**	**6.6**	**0.5**
Age			
<15	0	0.0	0.0
15-19	11	6.1	0.4
20-24	22	6.5	0.8
25-29	18	6.6	0.8
30-34	5	4.5	0.3
35-39	3	7.8	0.2
≥40	4	38.8	0.2
Race			
White	19	2.4	0.2
Black and other	44	24.8	2.4

72-74

Sources: Denominators for abortion ratios for 1972-1974 are from the National Center for Health Statistics, DHEW, "Final Natality Statistics," *Monthly Vital Statistics Report*, for 1972, see Vol. 23, No. 8, Supplement, 1974; for 1973, see Vol. 23, No. 11, Supplement, 1975; and for 1974, see Vol. 24, No. 11, Supplement 2, 1976. Denominators for abortion rates are from U.S. Bureau of the Census, "Population Estimates and Projections," *Current Population Reports*, Series P-25, No. 614, 1976, Table 2.

Figure 2. Illegal abortion mortality rate per million women aged 15-44, by state, United States, 1972-1974



lowing two hours of severe vaginal hemorrhage. She refused to answer any questions about attempting to induce an abortion. She was immediately taken to surgery, where initial attempts to control the hemorrhage and completely evacuate the uterus proved impossible. A laparotomy was performed, and a large retroperitoneal hematoma was discovered, the result of extensive lacerations of the lower uterine segment. Uterine perforation from previous instrumentation was suspected. In an effort to control the hemorrhage, a total hysterectomy was performed. During and after the procedure the patient was given 10 units of blood and in the immediate postoperative period, her condition appeared to stabilize; however, 12 hours later, she again went into shock, had evidence of brain damage secondary to low oxygen, and died of cardiac arrest. No autopsy was performed, but a pathology report on the operative specimens showed a cervix and uterus with "extensive deep lacerations and evidence of recent hemorrhage." The impression of the pathologist was that an illegal, possibly self-induced, abortion with an unknown instrument had been attempted.

Although this patient was younger than most of the women who died from illegal abortions, she had three typical characteristics: She was black, more than 12 weeks' pregnant, and had induced her abortion in her own community.

Discussion

Before the 1973 Supreme Court abortion decisions, deaths after illegal procedures accounted for the largest percentage of abortion-related deaths. Between 1940 and 1972, more than 75 percent of abortion deaths were associated with criminal procedures.[3] Previous epidemiologic analyses of women who died from illegal abortions were based on statistics gathered either by state maternal mortality review committees or by state health departments.

Between 1972 and 1974, the continuous three-year decline in illegal abortion deaths occurred concurrently with the increased availability of legal abortion services throughout the country that followed the 1973 Supreme Court decisions.[4] Tietze has suggested that the predominant effect of legalizing abortion in New York City was to shift those procedures formerly terminated illegally to presumably safer legal facilities.[5] The recent rapid decline in illegal abortion deaths indicates that this trend is occurring nationwide.

Ideally, no pregnant woman in the United States today should have to seek an illegal abortion. However, the most recent survey by The Alan Guttmacher Institute (AGI) found that in 1974, there were widespread differentials in access to legal abortions, especially for low-income women and women who lived in rural or other nonmetropolitan areas.[6] Presumably, this discrepancy accounts in part for the differences in the characteristics of women who died from illegal and legal abortions. For example, proportionately more nonwhite than white women continue to die following illegal abortions. This may be a consequence of their generally lower socioeconomic status. Many of these women may have been unable to afford to go outside their localities to communities where safe, legal abortions were available and obtained more dangerous self-induced or other illegal procedures at home.

Since the increased availability of legal abortion has been associated nationwide with a sharp decline in deaths related to

Table 3. Selected characteristics of U.S. women whose deaths were associated with illegal and legal abortions, compared to characteristics of legal abortion patients, 1972-1974

Characteristic	Illegal abortion deaths	Legal abortion deaths	Legal abortion patients*
Total	100.0 %	100.0 %	100.0 %
Age			
<15	0.0	1.4	1.5
15-19	17.5	17.6	31.1
20-24	34.9	41.9	32.1
25-29	28.6	12.1	17.7
30-34	7.9	13.5	9.9
35-39	4.8	8.1	5.5
≥40	6.3	5.4	2.2
Median	24.7	23.7	22.7
Race			
White	30.2	48.6	72.8
Black and other	69.8	51.4	27.2
Gestation (weeks)			
≤8	4.8	4.1	38.0
9-10	25.4	17.6	29.6
11-12	25.4	16.2	16.8
13-15	15.9	16.2	6.6
16-20	28.5	37.8	7.5
≥21	0.0	8.1	1.5
Median	12.6	15.2	10.2
Place of abortion			
In state of residence	96.8	82.4	78.4
Out of state	3.2	17.6	21.6

* Source: Center for Disease Control, DHEW, *Abortion Surveillance, Annual Summary 1974*, Atlanta, 1976.

Note: Unknowns redistributed on a pro rata basis.

illegal abortion, it seems anomalous that the District of Columbia and New York State, where legal abortions have been widely available since 1970, had much higher illegal abortion mortality than the U.S. average for 1972-1974 (seven and two times the U.S. average, respectively). Where the numbers are so small (two deaths in the District over the three-year period), the fluctuation may be due to chance, or to a unique circumstance (almost all of the New York deaths took place in one year—1972). Clearly, however, even where there is widespread access to legal abortion services, these data show, there will still be women who will try to induce their own abortions or turn to nonphysician operators because of ignorance, poverty, mistrust or other reasons—with sometimes fatal results.

The Number of Illegal Abortions

No official data exist on the number of illegal abortions that are performed. In 1955, a panel of experts could only provide a "best estimate" of between 200,000 and 1.2 million illegally induced abortions occurring annually in the United States.[7]

We may reasonably assume that mortality is higher following abortions that are self-induced or induced by nonphysicians than following those performed by doctors. However, we cannot easily evaluate this hypothesis, since the mortality risk reflects both the experience of the person performing the illegal abortion and the quality of medical services available for the treatment of serious complications. Over the years 1972-1974, for instance, it is reasonable to believe that illegal abortion may have become more dangerous than in the preliberalization years, since experienced physicians who had previously performed illegal procedures would have tended to migrate into the legal sphere.

For purposes of estimation, we speculate here that the illegal abortion death-to-case rate in 1972 was 30 per 100,000—a figure close to that used in previous calculations by Tietze,[8] and lower than the maternal mortality rate (exclusive of abortion deaths) for the United States in 1960.[9] It is approximately eight times greater than the death-to-case rate for legal abortion. If we apply this death-to-case rate to the total number of deaths associated with illegal abortions for 1972-1974, the total number of illegal abortions performed in the country would have declined from about 130,000 in 1972 to 63,000 in 1973 to 17,000 in 1974. We emphasize that these numbers are rough estimates, derived from hypothesized levels of risk for illegal abortion.

Illegal Abortions and Unmet Need

The estimated number of illegal abortions derived from our model is much smaller than the unmet need for abortion services estimated by the AGI.[10] Our calculations yield approximately 17,000 illegal abortions performed in 1974; while the AGI estimates that 358,000-869,000 women were in *need of* abortion services but did not receive them. It is possible that our figure is too low or that the AGI's estimate of abortion need is too high. However, even if the CDC figures are doubled and the AGI estimates halved, the clear implication is that the overwhelming majority of women who constitute the unmet need for abortion are now carrying their unplanned pregnancies to term rather than obtaining illegal abortions.

If this is true, then these estimates are consistent with the previously proposed hypothesis that legalization of abortion has a two-phase effect—first on public health and then on unintended fertility.[11] The initial effect, as we have shown, has already occurred in the United States: namely, the substitution of legal for illegal abortions, resulting in an accelerated decline in abortion mortality—especially illegal abortion mortality. Only three illegal abortion deaths have been reported in the United States thus far for 1975, and we hope that with the continued increase in legal abortion services, illegal abortion may soon be virtually eliminated as a cause of death.

The second expected effect is the substitution of legal abortions for unintended births, resulting in an accelerated decline in unplanned fertility. Although the rise in legal abortion services since the 1973 Supreme Court decisions has been phenomenal, the AGI survey found that services are highly concentrated among very few providers—mostly nonhospital clinics—in comparatively few large metropolitan areas.[12] It is doubtful that the need for safe, legal termination of unplanned pregnancies among poor women who live outside the great metropolitan centers will be adequately met unless services are more widely distributed. To what extent unplanned fertility would still occur because of moral or other objections to abortion is unknown at this time.

Conclusion

The number of illegal abortion deaths in the United States declined markedly following the Supreme Court's 1973 abortion decisions. Minority-group women have been disproportionately represented among those who died following illegal abortions, almost all of which occurred in the woman's state of residence. Our results suggest that there is a need to provide better and more widely available legal abortion services, especially for those women who are at high risk of seeking illegal abortions. Any actions which impede their access to legal abortion may increase their risk of death.

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Legal Abortion: The Public Health Record

Willard Cates, Jr.

In the public health annals of the United States, the chapter on developments in abortion over the last decade is a record of exceptionally rapid change. In that time, during which abortion ceased to be a clandestine procedure and began to be practiced under normal medical conditions, we have come to know more about it than any other surgical operation.

Summary. The increasing availability and utilization of legal abortion in the United States had several important effects on public health in the 1970's. It reduced deaths and surgical complications among women of childbearing age; it made possible the development of safer surgical procedures for pregnancy termination; and it increased the provision of low-cost outpatient gynecologic services. There is some concern about potential adverse outcomes in future desired pregnancies and possibly higher risks of breast cancer in certain women.

The purpose of this article is to describe objectively what we know about the effect on public health of the increased availability of legal abortion. The morality of abortion is a controversial topic, and the statistical data brought together here do not address that issue.

No direct count of the number of illegal abortions has ever been possible. Estimates have been made by various means, such as local surveys with the randomized response technique (*1*), extrapolations from deaths and hospitalizations (*2*), and retrospective projections based on numbers of births and legal abortions (*3, 4*). Through these approaches, most estimates of illegally induced abortion in the United States in the 1960's range between 200,000 and 1,200,000 a year. In Fig. 1 the midpoint of this range is taken arbitrarily for the year 1969, and the estimates for subsequent years have been extrapolated from similar data (*5*).

Deaths and Complications

Illegal abortions caused sizable numbers of deaths and complications among American women. For example, in 1965, 235 deaths, or 20 percent of all deaths related to pregnancy and childbirth, were attributed to abortion (*6*). Complications from abortion accounted for nearly 20 percent of pregnancy-related admissions to municipal hospitals in New York and California during the 1960's (*6*); the average length of stay of these patients was 4 days (*6*).

During the 1970's the United States passed through three stages with regard to the availability of legal abortion: until the middle of 1970 legal abortion was generally not available; from mid-1970 through early 1973 it was available in some regions; since 1973 it has been generally available throughout the nation. The number of reported legal abortions increased from approximately 22,000 in 1969 to over 1.5 million in 1980 (*7, 8*). Initially the increase in legal abortions was accompanied by a progressive decline in the estimated number of illegal abortions (Fig. 1). Thus, most of the initial increase in legal abortions was due to a corresponding drop in illegal abortions (*3, 4, 9*).

This shift from illegal to legal abortions has had a documented effect on deaths of women of reproductive age (*10*). In 1965, even before the availability of legal abortion, deaths of women from all types of abortion began to decline more rapidly than other causes of death related to pregnancy and childbirth (Fig. 2). One reason may be the introduction of more effective contraception at that time. Between 1965 and 1970 oral contraceptives and intrauterine devices were used by an increasing percentage of married women (*11*), and this was associated with a decline in unwanted fertility during those years (*12*). Another possibility, suggested by Tietze (*3*), is that illegal abortions may have shifted from the nonmedical to the medical sector and become safer.

The decline of abortion mortality rapidly accelerated in 1970 and generally continued through 1976 (Fig. 2). This accelerated decline further suggests that legal abortions were primarily replacing illegal abortions. If legal abortions had been replacing term births, then deaths to women from abortion should have increased relative to deaths from other pregnancy-related causes. Instead, the opposite occurred.

A clearer view of these trends appears in Table 1, based upon records started in 1972 by the Centers for Disease Control (CDC) in which abortion-related deaths are separated into three categories—legally induced, illegally induced, and spontaneous. In 1972 there were 90 abortion-related deaths; in 1979 there were 29. Through 1976 the highest proportion of the decline was in the illegal category, where the number of deaths decreased from 39 to 2. The reduction in illegal-abortion mortality had a distinct temporal association with the increasing availability of legal abortion.

During the initial years of CDC's surveillance of abortion-related mortality, the number of deaths after legally induced abortion increased slightly (Table 1), consistent with the increasing number of such abortions performed. In 1976, however, the number of deaths from legally induced abortion decreased precipitously, and it has remained lower than in the initial years despite a continuing increase in the number of legal abortions performed. Thus, the death-to-case rate for legal abortion has declined (Fig. 3).

Morbidity trends for abortion in recent years parallel mortality trends. Studies performed at national, state, and local levels show that hospitalization of women with complications resulting from abortion has decreased. Estimates based on the Hospital Discharge Survey from 1970 to 1977 show a general decline in number of patients with complications from other-than-legal abortions; the greatest part of this decline occurred in 1973, the year of the Supreme Court decisions striking down state laws prohibiting abortion (*13*). Individual hospitals on both the east and the west coasts have registered similar declines (*14*).

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Legal abortion has lower morbidity (*15, 16*) and mortality (*17*) rates than does pregnancy continued to term. From 10 to 15 percent of term births are by cesarean section (*18*), whereas only 07 percent of first-trimester abortions entail intra-abdominal operations (*19*), and second-trimester abortion methods lead to major surgery in only .1 to .2 percent of cases (*20*). Thus, the risk of having to undergo major surgery for a complication of a legal abortion is approximately 1/100 that of carrying a pregnancy to term. The rates of severe psychiatric sequelae are lower for women who obtain legal abortions than for those who have normal pregnancies and a live birth (*21, 22*). The risk—adjusted for age and race—of dying from an abortion induced during the first 15 weeks of pregnancy is one-seventh the risk of dying from pregnancy and childbirth (Fig. 4).

The risk to the woman of continuing rather than terminating her pregnancy may be still greater when the pregnancy is unwanted. Women with negative attitudes toward their pregnancies have higher postpartum infection and hemorrhage rates than women with more favorable attitudes (*16*). Possible mechanisms for the poorer obstetric outcomes associated with unwanted pregnancies include a direct stress-mediated influence on catecholamines (*23*), less concern by the woman for proper prenatal care, and differences in clinical management of labor and delivery (*16*).

Development of Abortion Techniques and Expertise

The increased availability of legal abortion since 1970 has influenced the safety of abortion methods and the skill of clinicians. The sixfold increase in the number of legal abortions performed has led to rapid development of technology (*24*). The most influential change has been the widespread adoption of the vacuum aspiration technique (suction curettage) (*25*), which replaced the traditional scraping technique (sharp curettage) as the primary means of terminating pregnancies. In 1970 suction was used in 54 percent of cases, sharp in 46 percent (*19*). By 1978 suction curettage accounted for 90 percent of all abortions by curettage; of curettages done at 12 weeks or earlier, 96 percent were by suction (*7*).

Table 1. Deaths related to legally induced, illegal, and spontaneous abortions in the United States, 1972 to 1979. [Data from (*76*)]

Year	Abortion category			
	Legally induced	Illegal	Spontaneous	Unknown
1972	24	39	25	2
1973	26	19	10	2
1974	26	6	21	1
1975	31	4	14	0
1976	11	2	13	1
1977	18	4	16	0
1978	11	7	9	0
1979*	20	0	9	0

*Data are provisional

Another improvement has been the recognition that curettage techniques can terminate pregnancies at 13 weeks' gestation or later more safely than the alternative methods (*26*); thus, delaying an abortion through the 13- to 16-week interval, as is required for the instillation of abortifacients into the uterus, is no longer considered necessary. Before legal abortion was available, performing curettage on a pregnant uterus after 12 weeks was thought to be too dangerous. Once abortion became legal, comparative studies could be undertaken, from which we have learned that curettage techniques, especially through 16 weeks' gestation, are safer than instillation procedures (*26, 27*).

The legalization of abortion has given clinicians the opportunity to learn different surgical techniques and to manage the immediate complications associated with these techniques. Before legalization very few pregnancy-termination procedures were taught in routine obstetric and gynecologic training programs (*28*). The only experience with uterine evacuation for residents in training usually came from performing sharp curettage on a nonpregnant uterus for diagnostic purposes or when removing residual uterine tissue after a routine miscarriage. These procedures are different from those required for evacuating a pregnant uterus.

The increase in physician training and experience may be one factor (*28, 29*) in the decrease in deaths related to legally induced abortion after 1975 (Fig. 3). The death-to-case rate for legal abortion has decreased from 6.2 per 100,000 in 1970 to 1.5 in 1979. Improvements in anesthesia technique, use of better methods of dilatation, reductions in the use of hysterotomy or hysterectomy for purposes of abortion, greater willingness to reevacuate a uterus if retained tissue is suspected, and physician familiarity with other abortion complications all may have contributed.

Delivery of Abortion Services

The increasing availability of and requests for abortion services have also led to two changes in when and where they are rendered: first, women obtaining legally induced abortions are doing so at progressively earlier gestational stages (*7*); second, most abortions are now being performed in nonhospital facilities, the so-called freestanding clinics (*8*). These two factors concurrently influence the safety, convenience, and cost of abortions.

Gestational stage is an important factor in complications after induced abortion (*15*). In 1970 nearly one-fourth of all abortions were performed at 13 weeks or later. By 1978, fewer than one in ten were performed at later than 13 weeks, and more than half were done before 8

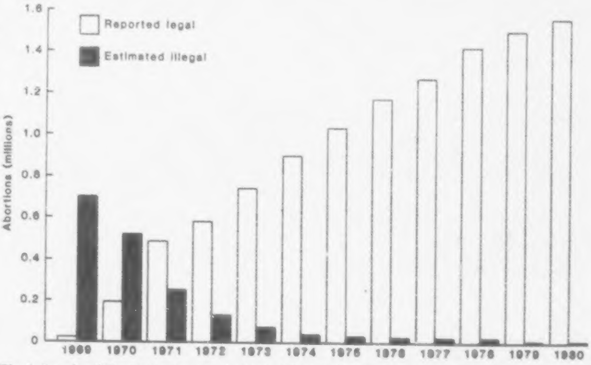


Fig. 1. Legal and illegal abortions in the United States, 1969 to 1980. Data for legal abortions are from (*7*) and (*8*). For method of estimating illegal abortions see (*5*).

weeks (*7*). This trend has contributed to reducing the number of deaths and complications.

Before the legalization of abortion, the term "in-hospital" was generally used to refer to legal abortion procedures (*30*). In 1970 having a legally induced abortion frequently required at least 2 days in hospital, the first for preoperative evaluation, the second for postoperative recovery (*31*). Even in 1973 more than 60 percent of all abortions were performed in hospitals. During the last 6 years the situation has reversed itself (*8*). By 1980 more than 70 percent of abortions were performed in freestanding clinics, without any hospitalization, and about half of those performed in hospitals were on an outpatient basis (*8*).

Costs of Medical Care

Before 1969, if it could be obtained a medically indicated abortion performed in a hospital was likely to cost more than $500 (*32*). For this reason women of high economic status were more likely than other women to obtain such abortions (*30*). Today the charge for a uterine evacuation performed in a clinic is usually no more than $150 (*33*). The average room charge for 1 day in a hospital (*34*) is alone more than the cost of an abortion by suction curettage in a clinic (*33*). Curettage to terminate pregnancies of more than 12 weeks' duration costs approximately one-half as much as the instillation procedures formerly used.

The increased availability of legal abortion has also reduced the cost to society of treating abortion complications. The saving in public expenditures for treating infected or incomplete abortions is estimated at $30 per abortion (*35*). Assuming a national decrease in morbidity similar to that in mortality, we may estimate a 75 percent reduction in complications and a saving thereby of approximately $20 million annually (*36*).

Formation of American Families

Marriage and childbearing patterns have been measurably influenced by legal abortion; so has the formation of American families. Before 1969 trends in marriage rates among states with different levels of legal abortion services were similar (*37*). Beginning in 1970, states with high ratios of legal abortions to live births began exhibiting significant declines in marriage rates, especially among teenage women, which were not experienced in states with lower legal-abortion ratios (*37*). Liberalized abortion policies apparently provided teenagers with a new alternative to marriage precipitated by premarital pregnancy. Such marriages are less stable than those of their contemporaries who postpone childbearing (*38*).

Legalization of abortion has been found to be temporally associated with a decline in out-of-wedlock birth rates in New York City (*39*), California (*40*), Oregon (*41*), and the United States as a whole (*42*). More than 85 percent of teenagers obtaining abortions were unmarried (*7*). States with the highest teenage and overall childbearing rates had the lowest abortion-to-live-birth ratios (*43*).

In American families at known risk of genetic anomalies, the availability of amniocentesis and selective abortion has allowed couples to undertake pregnancies they might not otherwise have considered or to continue pregnancies that they would otherwise have terminated.

Decision-Making About Reproduction

Many family planning providers have developed elaborate counseling protocols to aid women with unwanted pregnancies in making decisions about them (*33*, *44*). In a survey of a random sample of abortion providers in 1976, 98 percent of clinics and 60 percent of hospitals reported offering pregnancy counseling services (*33*); 100 percent of clinics and 60 percent of hospitals provided contraceptive counseling.

The increasing use of legal abortion is associated with an increasing use of contraception beyond that related to increased sexual activity. Four different methodologic approaches have supported this inference. First, longitudinal studies of women who have had abortions show that the percentage using contraception increases immediately after abortion, and contraception is still being used at least 6 months afterwards (*45*).

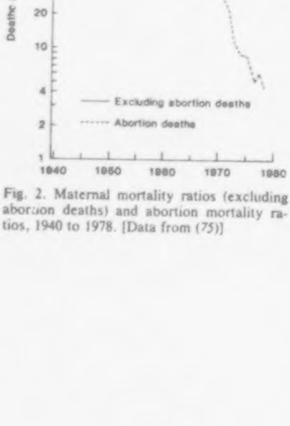


Fig. 2. Maternal mortality ratios (excluding abortion deaths) and abortion mortality ratios, 1940 to 1978. [Data from (*75*)]

Second, national studies of reproductive behavior conducted between 1965 and 1975 found an increasing percentage of married women using contraception even as legal abortion was becoming more widely available (*46*). The largest incremental annual increases, 3 percent per year, occurred between 1973 and 1975.

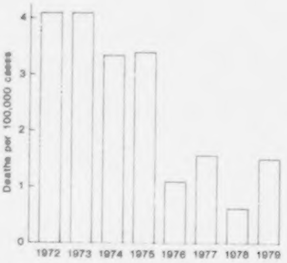
Third, the national patterns of increasing sexual activity (*47*) and declining birth rates (*48*) indicate that women are becoming increasingly able to control their fertility through either contraceptive practice or abortion. The proportion of never-married teenagers having unprotected intercourse decreased by one-half between 1971 and 1979 (*47*). In 1976, among young unmarried women who became pregnant unintentionally those who had an abortion were more likely to have been using contraception than were those who did not have an abortion (*49*).

Fourth, between 1960 and 1974 the national conception rates actually decreased, if allowances are made for the number of illegal abortions performed in earlier years (*50*). A study in New York City showed a decline in the conception rate also during the first 3 years that legal abortion was available (*51*).

Unethical Practices

The extent of shady practice in the abortion field is not precisely known, but the relatively low overall rates of morbidity and mortality after legal abortion would indicate that it is not widespread (*15*). Nevertheless, isolated examples of questionable clinical practices have received media attention.

Investigations in four cities (Detroit, Los Angeles, Chicago, and New York) have found occasional instances such as "pregnancy counseling" agencies that use high-pressure tactics and false information to induce women to go to a subsidiary abortion facility; "abortion" procedures performed on women who are not pregnant; operations performed by unlicensed personnel—either nonphysicians masquerading as physicians or physicians who have lost their license to practice; and facilities operating with-



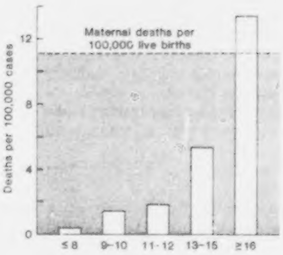


Fig. 3 (left). Death-to-case rates for legal abortions, 1972 to 1979. [Data from (*76*)] Fig. 4 (right). Death-to-case rates for legal abortion by weeks of gestation, and birth-related mortality rate, 1972 to 1978. [Data from (*7*) and (*75*)]

out state licenses and falsifying required medical records.

One practitioner allegedly performed intentionally incomplete abortions which would require a second procedure, so that he could bill for two separate operations; a patient died of infection resulting from retained products of conception (*52*). Another physician performed vaginal hysterotomy procedures in his private office; he was not equipped to handle operative emergencies that occurred and two women died from these procedures (*53*). Both physicians were found guilty of criminal offenses.

Early in the 1970's, use of outdated or unproven methods by some clinicians led to sporadic clusters of deaths and complications (*54*, *55*). For example, intrauterine placement of a "super coil" to terminate second-trimester pregnancies had high complication rates (*54*). This specific procedure was abandoned, but as late as 1977 a death was reported from implantation of a foreign body in a legal abortion attempt (*56*).

Shady practices and incompetence have been attacked by both abortion providers and those opposed to abortion. Responsible abortion providers have cooperated with investigative organizations to identify the problem practitioners (*57*) and have developed model standards to improve their already relatively safe procedure (*58*). Groups opposed to abortion have highlighted the isolated events as representative of the quality of medical care given by abortion providers and have used them to promote regulation of all abortion services (*59*).

Future Childbearing

Recent headlines have reported that women who have had induced abortions, especially those who have had multiple abortions, have an increased risk of adverse events in future desired pregnancies. These preliminary reports have led some to predict an epidemic of miscarriages, prematurity, and low-birth-weight infants (*60*).

Unfortunately, the best available data addressing this issue do not enable us to estimate the risk, if any (*61*, *62*). Scientific studies in the United States are inconsistent about whether one abortion or even multiple abortions were associated with increased rates of adverse reproductive outcomes in subsequent desired pregnancies. Of the eight studies currently published, two (*63*) have found a significant association of a single induced abortion with undesirable features of subsequent childbearing; the others (*64–66*) have found either no association or such a small one that chance could have accounted for it. Two published studies (*65*, *66*) have related multiple induced abortions to a threefold higher ratio of miscarriage, but one preliminary report from Hawaii (*67*) says that this finding could not be confirmed.

Several studies outside the United States (*68*) have demonstrated significant associations implicating a particular abortion procedure, especially the practice of sharp curettage. Since variations in abortion methods produce different short-term complications, they might also be expected to have different effects on long-term obstetric sequelae. For example, traditional sharp curettage frequently involves wider dilatation than current suction procedures (*22*). If the manner or width of dilatation, rather than the number or method of evacuation procedures, influences future pregnancies, use of laminaria for preoperative cervical dilatation might reduce risks (*66*).

Differences among the characteristics of women studied also produce conflicting results (*62*). For example, parity has an important effect on pregnancy outcome (*69*), with first births being at higher risk of preterm delivery than subsequent births. Thus, investigations in which first births to women with a previous abortion are compared with second births to women with a previous term birth will tend to find more complications among the abortion group, because of the difference in parity (*62*).

Breast Cancer

Whether induced abortion is associated with subsequent development of breast cancer is another question about which there is growing concern (*70*). Previous international investigations have shown that a woman is at lower risk of developing breast cancer if she gives birth at a young age (*71*). However, only full-term pregnancies afford this protection. With first pregnancies that terminate within 4 months there appears to be an increased risk of breast cancer (*72*). Unfortunately, these earlier studies did not differentiate between induced and spontaneous abortion.

A recent investigation in Los Angeles (*70*) found that in certain circumstances the risk of breast cancer in young women was more than doubled if they had had either an induced or a spontaneous abortion. Two specific conditions were involved: (i) the abortion had occurred before 3 months' gestation and (ii) the women were nulliparous at the time of the abortion. A biologic explanation for a possible positive association between early abortion and breast cancer, and a negative association between early age at first childbearing and breast cancer, might involve variations in breast tissue during different intervals of pregnancy (*73*). Early in pregnancy, rapid proliferation of breast tissue might render more cells susceptible to neoplastic stimuli (tumor initiation) or might hasten the growth of malignant cells (tumor promotion). The protective effect of continuing a pregnancy to term could be due either to breast cell differentiation later in pregnancy or to a permanently altered estrogen profile during the later stages (*74*), or both.

While data from this investigation are consistent with earlier findings, the case-control designs raise questions of ascertainment bias. Specifically, might women with breast cancer be more likely to remember or admit previous abortions than a comparison group would be? Also, women in the Los Angeles study had their cancers diagnosed before age 32 (*70*). The incidence of breast cancer at this age is very low, about 20 per 100,000 women (*73*). Whether or not any association between abortion and breast cancer occurs later in life has not been ascertained. If that association is not found, then the effect of abortion on breast cancer incidence, if any, would be very small. Further investigations may cast light on these important questions.

Conclusion

To summarize, the increasing availability and utilization of legal abortion in the United States has had an important public health impact. The data clearly indicate that the legalization of abortion has been accompanied by a decline in deaths and complications among American women of childbearing age. It led to the rapid development of technological advances and clinical expertise in pregnancy-termination procedures. It stimulated development of more convenient, low-cost outpatient health services. Legal abortion has also brought with it new concerns—for example, about whether abortion has adverse effects on future desired pregnancies and whether it increases the risk of breast cancer in certain women. Accurate information will help policy-makers, medical practitioners, and those most directly concerned—women of childbearing age—to make rational decisions about this subject.

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LEGAL ABORTION AND WOMEN'S HEALTH: GAINS AND LOSSES IN THE 1970s

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SUMMARY

The increasing availability and utilization of legal abortion in the United States had an important public health impact in the 1970s. It reduced deaths and complications among American women of childbearing age by providing less hazardous alternatives for women faced with an unwanted pregnancy; it allowed the development of safer surgical procedures for pregnancy termination; it provided a focus for convenient, low-cost delivery of outpatient health services; and it facilitated decision making about reproductive choices. However, legal abortion has been accompanied by developments of some concern--unethical practitioners, potential adverse outcomes in future desired pregnancies, and possibly higher risks of breast cancer in selected women.

KEY WORDS: Abortion, Abortion Morbidity, Abortion Mortality, Public Health, Women's Health

The increasing availability of legal abortion over the past decade has provided the annals of public health in the United States with one of its most rapidly changing chapters. A clandestine procedure before 1970, abortion has been thrust into the medical arena--where procedures can be performed safely, techniques improved, and costs reduced. After 10 years, we now know more about legal abortion than any other surgical procedure.

Since abortion is a controversial topic, it is essential to use accurate and reliable data in arriving at policy decisions. The scientific data do not directly address society's ethical debate on the issue of abortion. However, the data objectively portray the public health impact for women of childbearing age resulting from the increased availability of legal abortion in the United States over the past decade.

The practice of legal abortion has positively affected many areas of public health: the reduction of deaths and complications among American women of reproductive age; the development of safer procedures for pregnancy termination; the delivery of abortion services to women; the costs of both the abortion procedure itself and its resultant complications; the formation of American families; and decision-making about human reproduction. However, the increasing availability of legal abortion has not been without its negative elements: unethical medical practices; potential obstetric sequelae; and possibly higher risks of breast cancer. In the remainder of this article, I will elaborate on these public health issues.

Deaths and Complications Among American Women of Reproductive Age

Before 1969, the best estimate of the annual range of induced abortions in the United States was between 200,000 and 1.2 million (1,2). Nearly all these abortions were illegally induced, which caused sizeable numbers of deaths and complications among American women of reproductive age. For example, in 1965, 235 deaths, or 20% of all deaths related to pregnancy and childbirth were attributed to abortion (3). Moreover, in the 1960s, complications from abortion accounted for nearly 20% of pregnancy-related admissions to municipal hospitals in New York and California (3); the average length of stay required to treat these complications was four days (3).

During the 1970s, the United States passed through three stages with regard to the availability of legal abortion: 1) until the middle of 1970, legal abortion was generally not available; 2) from mid-1970 through early 1973, it was available on a limited regional basis; and 3) since 1973, it has been generally available throughout the nation. During this time, the number of reported legal abortions increased from approximately 22,000 in 1969 to over 1.4 million in 1978 (4,5). Initially the increase in legal abortions was accompanied by a progressive decline in the estimated number of illegal abortions (Figure 1). Thus, most of the initial increase in legal abortions was due to a corresponding drop in illegal abortions (6-8).

This shift from illegal to legal abortions has had a documented impact on deaths to American women of reproductive age (9). In 1965, even before the availability of legal abortion, deaths of women from all types of abortion began to decline more rapidly than other causes of death related to pregnancy and childbirth (Figure 2) Several explanations exist for the decline in abortion-related deaths in the mid-1960s. First, the introduction of more effective contraception led to fewer unwanted pregnancies, which presumably reduced the need for illegal abortions. Second, illegal abortions may have shifted from the non-medical to the medical sector and become safer.

In 1970 the decline of abortion mortality rapidly accelerated and generally continued through 1976. This accelerated decline further implies that legal abortions were primarily substitutes for illegal abortions. If they had been substituted for term births, then deaths to women from abortion should have increased relative to deaths from other pregnancy-related causes. Instead, the opposite occurred.

Categorization by the Centers for Disease Control (CDC) of all abortion-related deaths into one of three categories--legally induced, illegally induced, or spontaneous--permits an even clearer view of these trends. In 1972, there were 90 abortion-related deaths, while in 1978 there were 27 (4). Through 1976, nearly all of this decline occurred in the illegally induced category, where the number of deaths to women decreased from 39 in 1972 to 2 in 1976. The reduction in illegal abortion mortality had a distinct temporal association with the increasing availability of legal abortion.

After 1976, mortality from legally induced abortion declined markedly. During the initial years of CDC's surveillance of abortion-related mortality, the number of deaths after legally induced abortion increased slightly, consistent with the increasing number of women obtaining legal abortions. In 1976, however, the number of deaths from legally induced abortion decreased precipitously and has remained at a lower level through 1978, despite a continuing increase in the number of procedures performed. Thus, the death-to-case rate for legal abortion has declined (Figure 3).

Morbidity trends for abortion in recent years parallel mortality trends. Studies performed at national, state, and local levels show that hospitalization of women with complications resulting from abortion has decreased. Estimates based on the Hospital Discharge Survey from 1970-1977 show a general decline in hospital discharges for women with diagnoses related to other-than-legal abortion and its complications; the greatest part of this decline occurred in 1973, immediately after the Supreme Court 'ecisions (10). In addition, individual hospitals on both the east and west coasts have shown similar declines (11-17).

These reductions in mortality and morbidity have occurred primarily because legal abortion is safer than any other alternatives available to pregnant women. Once pregnant, a woman is at increased risk of death as the pregnancy progresses, no matter what her choice of outcomes. The acceptability of risks associated with pregnancy and childbirth may vary depending on whether a pregnancy is wanted.

Besides legal abortion, the other two options for pregnant women are illegal abortion or carrying the pregnancy to term. Compared to illegally induced procedures, the data clearly indicate that legally induced abortion is markedly safer. Compared with continuing the pregnancy to term, terminating a pregnancy at 15 weeks or earlier is associated with lower morbidity (18,19) and mortality (20). For example, between 10%-15% of term births are delivered by cesarean section (21), whereas only 0.07% of suction curettage procedures result in intra-abdominal operations (22). Likewise, midtrimester abortion methods lead to laparotomy in only 0.1% to 0.2% of cases (18). Therefore, the risk of having to undergo major surgery for a complication of an abortion is approximately one one-hundredth that of carrying a pregnancy to term. More importantly, the risk of dying from induced abortion during the first 15 weeks of pregnancy is one-seventh the risk of dying from pregnancy and childbirth (Figure 4), even after standardizing the population groups for differences in age and race (20).

This increased risk to the woman of continuing rather than terminating her pregnancy is exaggerated when the pregnancy is unwanted (19). Women with negative attitudes toward their pregnancies have higher postpartum infection and hemorrhage rates than women with more favorable attitudes (19). Possible mechanisms for these poorer obstetric outcomes associated with unwanted pregnancies include a direct stress-mediated influence on catecholamines (23), less concern by the woman for proper pre-natal care (19) or differences in clinical management of labor and delivery (19).

Development of Abortion Techniques and Expertise

The increased availability of legal abortion in the United States since 1970 has influenced both the safety of abortion methods and the skill of the clinicians performing abortions. The six-fold increase in the number of abortion procedures over a relatively short interval has led to rapid improvements in technology (24). The most dramatic improvement has been the widespread adoption of suction curettage (25) to replace sharp curettage--the classic "D&C" method--as the primary means of terminating pregnancies. In 1970, the distribution of procedures performed by suction and sharp curettage was similar--54% were performed by suction and 46% by sharp (22). Over the next nine years, the percentage of suction curettage procedures gradually increased. By 1978 suction curettage accounted for 90% of all curettage procedures. Of those curettage methods used at 12 weeks or earlier, 96% were performed by suction (4).

Another improvement has been the recognition that dilatation and evacuation, referred to as D&E, can terminate pregnancies at 13 weeks' gestation or later more safely than the other alternative instillation methods (26); thus, delaying an abortion through the 13 to 16 week interval, required for instillation methods, is not appropriate. Before legal abortion was available, performing curettage on a pregnant uterus after 12 weeks was thought to be too dangerous; perhaps the increased frequency and severity of complications made the risk from an illegal procedure too dangerous for the practitioner to take a criminal risk (27).

Once abortion became legal, however, comparative studies could be undertaken to determine the safest methods of terminating pregnancy after 12 weeks. Through these studies, we have learned that uterine evacuation techniques, especially through 16 weeks' gestation, are safer than instillation procedures. As a result, the percentage of D&E procedures to terminate these later pregnancies has increased over recent years (28). In addition to increasing the safety of abortions, D&E has lowered costs, minimized inconvenience, and reduced the emotional trauma of midtrimester abortions for the pregnant woman.

Another technical factor which has probably improved is physician skill. Before the availability of legal abortion, very few pregnancy termination procedures were taught in routine obstetric and gynecologic training programs (29). The only experience with uterine evacuation for residents in training usually came either when performing sharp curettage on a non-pregnant uterus for diagnostic purposes or when removing residual uterine tissue after a routine miscarriage. These procedures are different from those involved in evacuating a pregnant uterus. The legalization of abortion has allowed clinicians the opportunity both to learn different surgical techniques and to manage the immediate complications associated with these techniques.

The increase in physician training and experience may be one factor contributing to the decrease in deaths related to legally induced abortion after 1975. The death-to-case rate for legal abortion has decreased from 6.2 per 100,000 procedures in 1970 to 0.6 in 1978 (4). Improvements in anesthesia technique, use of more appropriate methods of dilatation, reductions in the percentage of major operative procedures for abortion (i.e., hysterotomy or hysterectomy), greater willingness to re-evacuate a uterus in cases of suspected retained tissue, and physician familiarity with other abortion complications all may have played a role.

Delivery of Abortion Services

The increasing availability of and requests for abortion services have also led to two changes in when and where they are delivered: first, women obtaining legally induced abortions are doing so at progressively earlier gestational ages (4); second, most abortions are now being performed in non-hospital facilities, the so-called "freestanding clinics" (5). These two factors concurrently influence the safety, convenience, and cost of abortion procedures.

In 1970, nearly one out of every four abortions was performed at gestations of 13 weeks or later. By 1978, less than one in ten abortions was performed later than 13 weeks (4). Moreover, even within the first 12 weeks, there has been a shift toward obtaining procedures earlier in gestation: in 1978, over half of all women having abortions terminated their pregnancies before 8 weeks' gestation (4). Because gestational age is an important factor and affects the risk of complications after legally induced abortion (18), the trend toward obtaining abortions earlier in gestation has contributed to reducing the number of deaths and complications from this procedure.

Before the legalization of abortion, the term "in-hospital" was generally used to describe legal abortion procedures (30). In 1970, women were frequently hospitalized for at least two days in order to have a legally induced abortion: the first night was for preoperative evaluation, while the second night was for postoperative recovery (31). Even in 1973, over 60% of all abortions were performed in hospitals. However, by 1979, most abortion services were delivered by freestanding clinics (5). In the first quarter of 1979, over 70% of all abortions were performed in such clinics, without any hospitalization. Also, about half of the abortions performed in hospitals were on an outpatient basis. Thus, obtaining an abortion usually takes less than half a day, minimizing the inconvenience and cost to the woman (32).

This rapid change in clinical practice is unusual. Experience gained in the delivery of abortion services at freestanding clinics has led to an expansion of other services at these facilities. Many clinics are now providing infertility investigations, male and female sterilization procedures, family planning and contraceptive counseling, and routine outpatient gynecologic care, in addition to pregnancy termination services (32). These clinics have clearly demonstrated that ambulatory "surgi-centers" can effectively perform minor surgical procedures.

Costs of Medical Care

The increasing availability of legal abortion has affected its cost. Before 1969, if it could be obtained, an induced abortion frequently cost over $500 (1). For illegal abortions, the fee covered the risks and payoffs necessary for criminal activities, while for legal abortions, it covered both the physician's and the hospital's fees. Today, uterine evacuation procedures performed in clinics are usually no more than $150 (32). This cost has remained remarkably stable since 1970 despite 83% inflation over the past 10 years.

Today an abortion actually costs less than it did in 1969 and includes many additional services. In addition to the procedure, a woman receives pre- and postoperative supportive counseling, contraceptive methods, Rh immunoglobulin if she is Rh negative, and a follow-up examination (32). Also, many clinics underwrite the costs of treating any complications which result from the procedure (32).

The improvements in abortion technology and the increasing use of freestanding clinics have further reduced costs. For example, D&E procedures to terminate pregnancies of more than 12 weeks' gestation cost approximately one-half that for instillation procedures. Also, use of non-hospital facilities obviates the hospital charges that have played a major role in increasing the cost of medical care in the United States. The average charge for one day in a hospital is more than the cost of a suction curettage procedure in a freestanding clinic (32).

The increasing availability of legal abortion procedures has also reduced the cost to society of treating abortion complications. In New York City in 1974, the substitution of legal for illegal abortion led to an estimated saving of $30 per woman in public expenditures for treating septic and incomplete abortions (33). Applying these rates to the United States in 1978, over $42 million would have been saved. The improved safety of legal abortion techniques has also decreased abortion complications and resulting costs. Assuming a national decrease in morbidity similar to that in mortality, the 75% reduction in complications would save approximately $20 million annually (34).

Formation of American Families

Marriage and childbearing patterns have been measurably influenced by legal abortion; so has the formation of American families. In the United States before 1969, trends in marriage rates among states with different levels of legal abortion services were similar (35). Beginning in 1970, states with high legal abortion-live birth ratios began exhibiting significant declines in marriage rates, especially among teenage women, not experienced by states with lower legal abortion ratios (35). Liberalized abortion policies apparently provided many teenagers with a new alternative to high-risk marriages precipitated by a premarital pregnancy. Childbearing is more likely to produce negative consequences for teenagers than for older people (36). Young parents acquire less education than their contemporaries; their marriages are less stable than those of their contemporaries who postpone childbearing, and couples who become parents as teenagers usually have more children than they want (36).

Legalization of abortion has been temporally associated with a decline in out-of-wedlock birth rates in New York City (37), California (38), Oregon (39), and the United States as a whole (40). Since most teenage out-of-wedlock births were unwanted (36), and since more than 85% of abortions performed on teenagers have been obtained by unmarried women, some increase in the number of abortions among teenagers probably affected unintended fertility. States with the highest teenage and overall childbearing rates had the lowest abortion-to-live-birth ratios (41,42).

Legal abortion may also have affected childbearing patterns within marriage. While the annual divorce rate has been increasing since 1963, the number of children involved in divorces leveled off in 1974 (43). Children are not immune to the emotional trauma of divorce (44). Moreover, the opportunity to delay initial childbearing even after marriage permits American women to pursue careers without fear of temporary interruption by a birth.

For American families at known risk of genetic anomalies, the availability of amniocentesis and selective abortion has apparently led to 10% more pregnancies than otherwise would have occurred (45). The ability to obtain amniocentesis has allowed couples to either undertake pregnancies they might never have considered or else to continue pregnancies that they would have terminated (45). If the option of legal abortion were not possible, 10% of women undergoing amniocentesis would not otherwise have initiated or continued their pregnancies (45).

Decision Making About Reproduction

As American consumers have increasingly demanded more information about health services, many family planning providers have developed elaborate counseling protocols to aid women with unwanted pregnancies in making responsible decisions (46). Most women considering pregnancy termination do not take their decision lightly (47). Many have already made responsible decisions about their reproductive behavior before becoming pregnant (48). Others, especially teenagers without benefit of even rudimentary sexual knowledge, find the situation of an unwanted pregnancy the first important decision point in their lives (46).

Typical approaches to pregnancy counseling involve the woman in an active decision-facilitating framework (46). Her feelings about the pregnancy are explored, and the risks, benefits, and alternatives available to her are discussed. Pregnancy counseling frequently includes discussion of contraception to prevent future unplanned pregnancies. The data have demonstrated that the increasing utilization of legal abortion is associated with an increasing proportion of women using contraception.

Four different methodologic approaches have found a positive correlation between legal abortion and use of contraception. First, longitudinal studies have documented a marked increase in the number of women using contraception after the abortion compared with before the pregnancy; moreover, these women continued to use effective contraception methods 6 months after their abortions (49,50).

Second, national studies of reproductive behavior conducted between 1965 and 1975 demonstrated an increasing percentage of married women using contraception even as legal abortion was becoming more widely available (51). Moreover, the largest incremental annual increases, 3% per year, occurred between 1973 and 1975.

Third, the national patterns of increasing sexual activity (52) and declining birth rates (53) indicate that women are becoming increasingly able to control their fertility through either contraceptive practice or abortion. The proportion of never-married teenagers having unprotected intercourse decreased by one-half between 1971 and 1979 (52). Moreover, in 1976, young unmarried women who became pregnant and had an abortion were probably more likely to be using contraception before their abortion than young women who became pregnant unintentionally and did not have an abortion (54).

Fourth, between 1960 and 1974, the national conception rates actually decreased, if allowances are made for the number of illegal abortions performed in earlier years (55). In New York City, the conception rate also declined during the initial three years legal abortion was available (56).

Unethical Medical Practices

Because of the relatively low fees for abortion procedures, abortion providers would have to perform a large number of legal abortions to enhance profit. Unfortunately, this sometimes causes competitive pressures which lead some facilities and clinicians to use practices considered unethical by many (57). Investigations in four cities (Detroit, Los Angeles, Chicago, and New York) have documented questionable medical practices such as 1) misleading "pregnancy counseling" agencies which use high-pressure tactics and false information to refer women to a subsidiary abortion facility; 2) "abortion" procedures deliberately performed on non-pregnant women without their informed consent; 3) operations performed by unlicensed personnel--either non-physicians masquerading as physicians or physicians who have previously lost their license to practice; and 4) facilities which are deliberately operated without state licenses and whose personnel knowingly falsify required medical records.

Besides the unethical practices, some physicians have deliberately performed dangerous abortion procedures. One practitioner allegedly performed intentional incomplete abortions which would require a second procedure; thus, he could bill for two separate operations (58). This practice not only involved fraudulent billing, but also put women at higher risk of morbidity and mortality; one woman eventually died from infection resulting from retained products of conception. Another physician performed vaginal hysterotomy procedures in his private office (59). He was not equipped to handle the operative emergencies which occurred. Two women died from these procedures. Both physicians were found guilty of criminal offenses.

In other situations, use of outdated or unproven methods by some clinicians have led to sporadic clusters of deaths and complications (60,61). For example, intrauterine placement of a "super coil" to terminate second trimester pregnancies led to unacceptably high complication rates (60). While this specific procedure has been abandoned, deaths still occur from use of indwelling foreign bodies by licensed physicians (62).

Finally, in at least two instances, abortion providers have admitted charging one fee for women funding their abortions through private sources and a second fee, two to three times higher, for women using public funding sources (63). Although the offenders claim these billing practices are necessary to underwrite the paperwork required for, and the delay inherent in, government third-party payments, the magnitude of these differences is hardly justifiable.

These unethical practices have been attacked by both abortion providers and those opposed to abortion. Most responsible abortion providers are concerned that the questionable medical practices will both endanger women's health and taint the safety record of legal abortion; as such, they have cooperated with investigative organizations to identify the problem practitioners (64) and have developed model standards to improve their already relatively safe procedure (57). On the other side, the those opposed to abortion have highlighted the isolated events as representative of the poor medical care delivered by abortion providers and have used them as a basis to regulate all abortion services. Yet, these regulations have both overstated the risks and added to the dangers of the procedure for the woman wishing to terminate her pregnancy (65).

Future Childbearing

Recent headlines have reported that women with prior induced abortions, especially previous multiple abortions, have an increased risk of adverse events in future desired pregnancies. These preliminary reports have led some to predict an epidemic of miscarriages, prematurity, and low-birth-weight infants in the future (66).

Unfortunately, the best available data addressing this issue do not permit a precise estimate of such risks (67-69). The scientific literature contains no consistency about whether abortion per se or even multiple abortions, produce increased risks of adverse reproductive outcomes in subsequent desired pregnancies. Those studies which have demonstrated significant associations have primarily implicated the particular type of abortion procedure, especially the practice of sharp curettage. Moreover, in many studies the characteristics of women obtaining abortions are different than those of women to whom they have been compared.

It is not surprising that different abortion procedures may influence long-term sequelae after induced abortion. Since variations in abortion methods produce different short-term complications, they might also be expected to have different effects on long-term obstetric sequelae. For example, traditional sharp curettage frequently involves wider dilatation than current suction procedures. Perhaps it is the manner and width of dilatation rather than the number or method of evacuation procedures which influences future pregnancies.

Differences among the characteristics of women studied also produce conflicting results. For example, parity has an important effect on pregnancy outcome, with first births being at higher risk of preterm delivery than subsequent births. Thus, investigations which compare first births of women with a previous abortion to second births of women with a previous term birth will tend to find more complications among the abortion group, spuriously due to differences in parity.

Determining whether a legally induced abortion endangers the course of a subsequent planned pregnancy should serve three constructive functions: 1) women facing the choice of pregnancy termination or continuation can have the benefit of complete and accurate information regarding their decision; 2) abortion procedures can be improved to reduce the causes of any long-term sequelae; and 3) women who already have had an induced abortion can be made aware of any potential risks so that they may seek and obtain proper obstetrical care during future pregnancies.

Breast Cancer

Whether induced abortion is associated with subsequent development of breast cancer is another area of increasing concern (70). Previous international investigations have shown that a woman is at lower risk of developing breast cancer if she gives birth at a young age (71). However, only full-term pregnancies afford this protection. If the first pregnancy terminates within 4 months' gestation, a woman appears to have an increased risk of breast cancer (72-76). Unfortunately, these earlier studies did not differentiate between induced and spontaneous abortion.

A recent investigation in Los Angeles (70) found breast cancer in young women to be associated with either an induced or a spontaneous abortion, provided 2 conditions were met: 1) the abortion occurred before 3 months' gestation; and 2) the woman was nulliparous at the time of the abortion. A biologic explanation for a positive association between early abortion and breast cancer and a negative association between early age at first childbearing and breast cancer might involve the different development of breast tissue during different intervals of pregnancy (77). Early in pregnancy, rapid proliferation of breast tissue might render more cells susceptible to neoplastic stimuli (tumor initiation), or might hasten the growth of malignant cells (tumor promotion). The protective effect of continuing a pregnancy to term could involve either breast cell differentiation later in pregnancy, and/or a permanently altered estrogen profile during the later stages of gestation (78).

While data from this investigation are consistent with earlier findings, the case-control designs raise questions of ascertainment bias. Specifically, could women with breast cancer be more likely to remember and/or admit previous abortions than a comparison group? Also, women in the Los Angeles study had their cancers diagnosed prior to age 32 (70). Whether any association between abortion and breast cancer occurs later in life has not been documented. If that association is not found, then the public health impact of abortion on breast cancer incidence, if any, would be very small. Further investigations may cast light on these important questions.

As with adverse obstetrical outcomes, the finding of an association between early breast cancer and early abortion should be shared with pregnant women so that they may have full information on which to base their decision to continue or terminate their pregnancy. Also, women who have already undergone a first-trimester abortion prior to a full-term birth might pay greater attention to screening for breast cancer.

Conclusion

To summarize, the increasing availability and utilization of legal abortion in the United States has had an important public health impact in the 1970s. Like any social phenomenon, the issue of legal abortion has its advantages and disadvantages. Accurate and reliable information will help policy makers, practitioners and American women make more rational decisions on abortion.

Acknowledgements

The author thanks the following individuals for their helpful suggestions and constructive input to this manuscript: David A. Grimes, Christopher Tietze, Carol L.R. Hogue, Roger W. Rochat, Carl W. Tyler, Horace G. Ogden, Dennis Tolsma, Sally Faith Dorfman, Laura Leathers, and Martha Mayfield.

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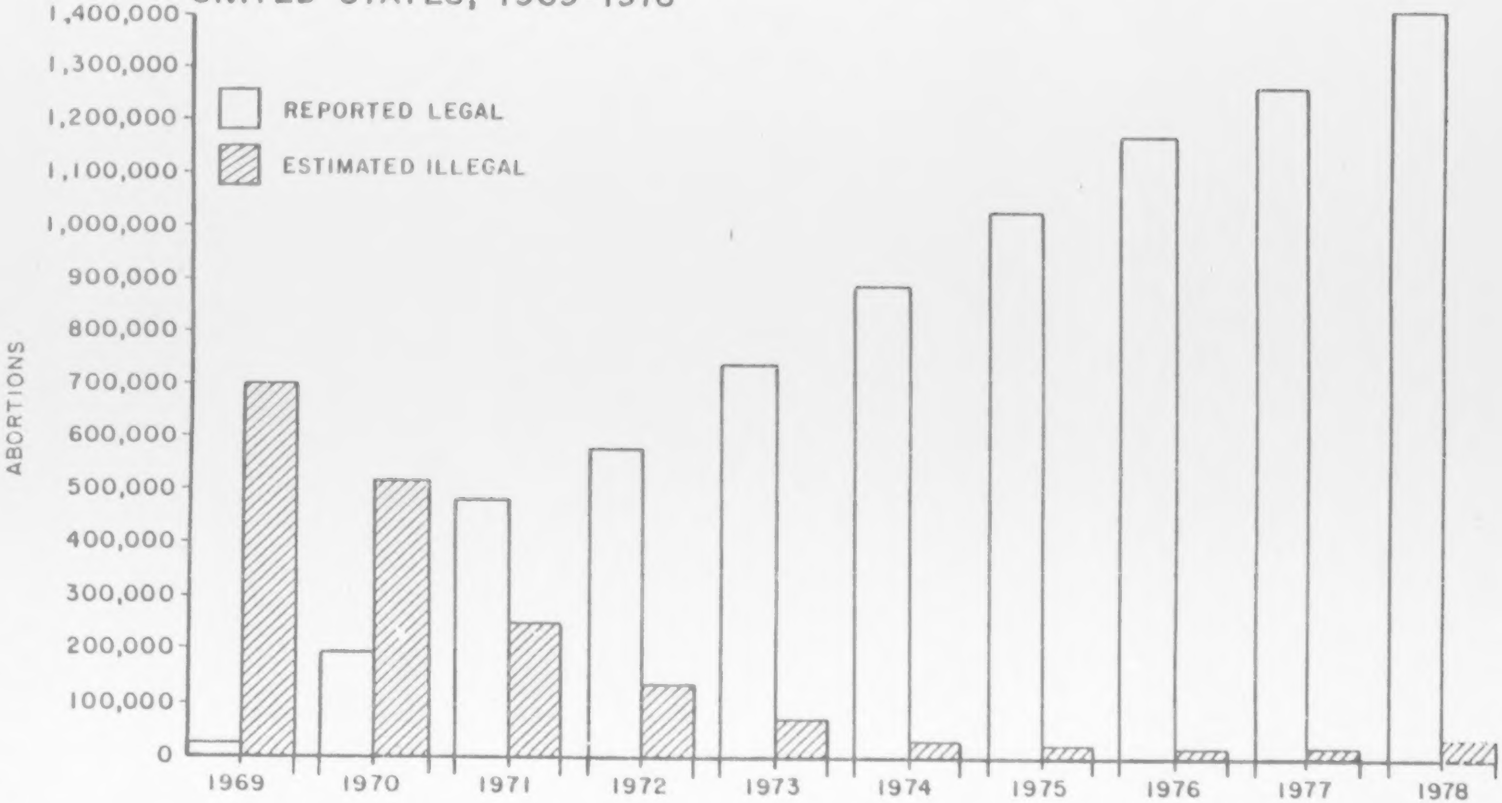
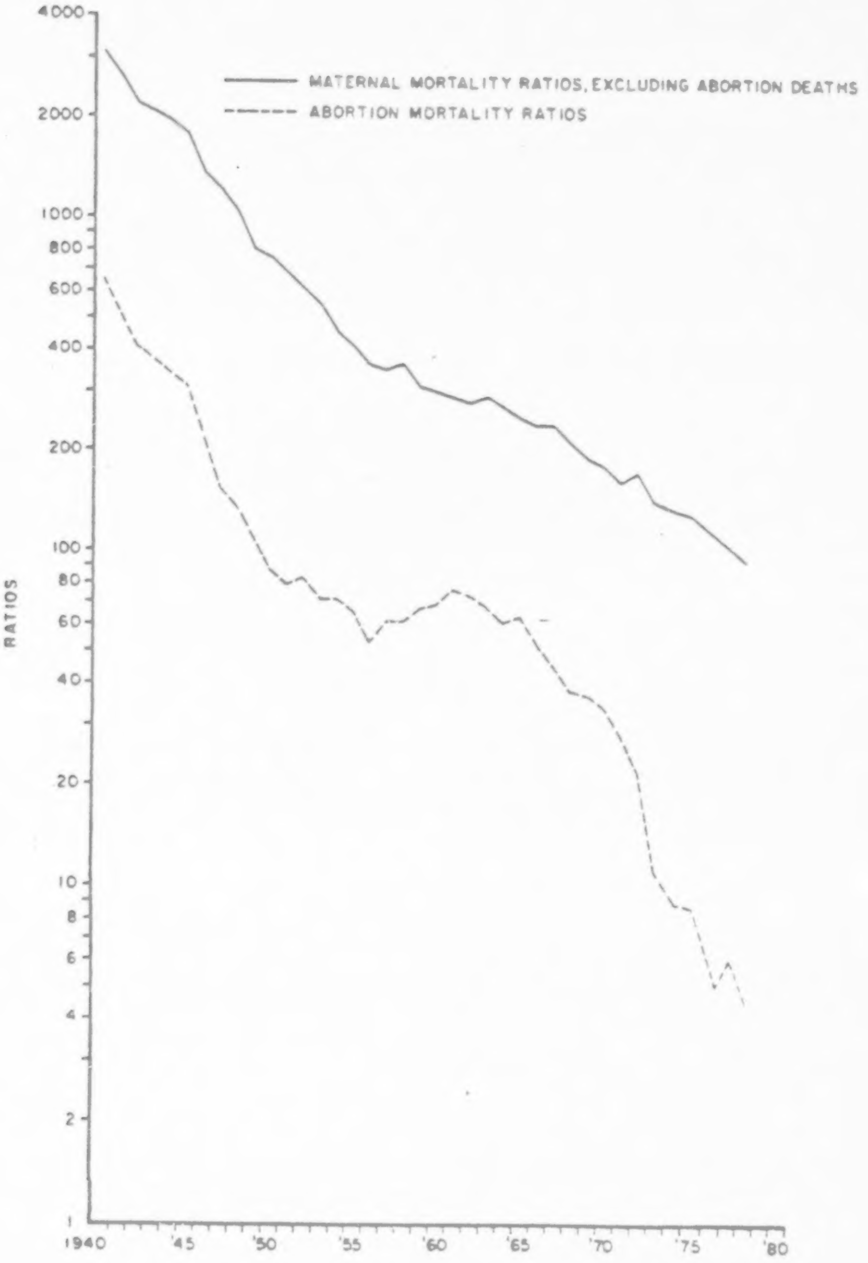


Fig. 1 RELATIONSHIP BETWEEN LEGAL AND ILLEGAL ABORTION, UNITED STATES, 1969-1978

Fig. 2 MATERNAL MORTALITY RATIOS (EXCLUDING ABORTION DEATHS)[1,2] AND ABORTION MORTALITY RATIOS[2], UNITED STATES, 1940-1978[3]



[1] Maternal mortality ratio (excluding abortion deaths) equals total maternal deaths minus abortion deaths

[2] Deaths per 1,000,000 live births

[3] Source: U.S. Vital Statistics, National Center for Health Statistics

Fig. 3

DEATH-TO-CASE RATES FOR LEGAL ABORTION, UNITED STATES, 1972-1978

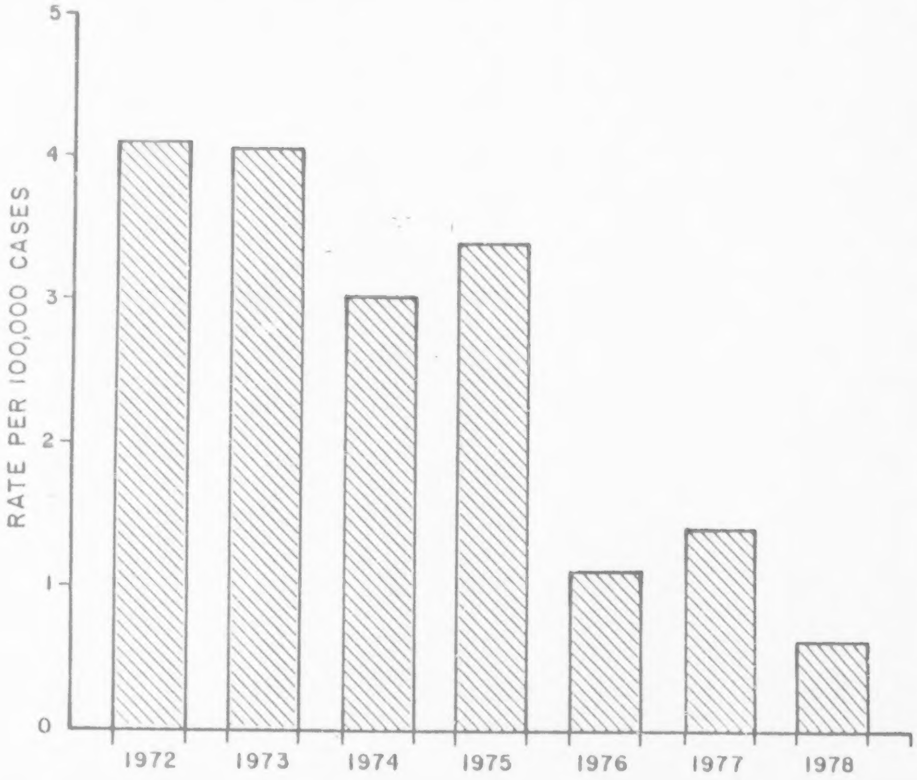
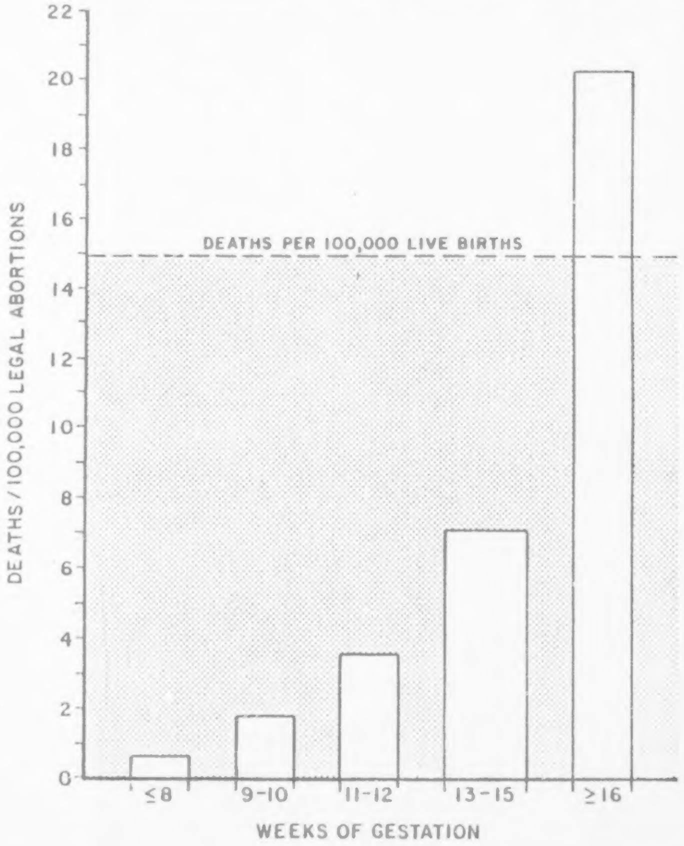


Fig. 4 STANDARDIZED DEATH-TO-CASE RATES, BY WEEKS OF GESTATION, COMPARED WITH STANDARDIZED BIRTH-RELATED MORTALITY RATE, U. S., 1972 – 1975



Abortion Fees by Foot Length Urged by Center for Disease Control's Cates

By Elizabeth Moore

The abortion fee of the future might be determined by "post-operative measurement of the fetal foot," if a standard graduated-fee proposed by a prominent public official is adopted by the abortion industry.

Abortion clinics have been urged by another leading abortion proponent to minimize the consequences of the Hyde Amendment by billing Medicaid for such abortion-related services as pregnancy tests, pelvic exams, lab work and contraceptives.

These proposals appear in separate articles in the July/August 1980 issue of **Family Planning Perspectives**, a publication of Planned Parenthood's research affiliate, the Alan Guttmacher Institute.

The first article is written by Willard Cates Jr., Chief of the Abortion Surveillance Branch of the federal government's Center for Disease Control in Atlanta. Cates argues in favor of a uniform scale for abortion services — one which would utilize a standard "baseline fee" with a graduated cost increase corresponding to increased gestation. The primary purpose of his system, he says, would be to discourage delay and to "promote abortions" early in pregnancy.

A table of sample fees in the article lists a "baseline" charge of $160, applicable to pregnancies between 7-8 weeks; the cost rises to $175 at 9-10 weeks, $200 between 11-12 weeks, and $225 during the 13th and 14th weeks. Abortions done earlier than the 7th gestational week, however, are priced at $175 — largely because incomplete procedures are statistically more common then, and because of the possibility that a patient may not be pregnant. At 19 weeks, the highest fetal age figure appearing on the chart, the proposed fee reaches $300.

Because pre-operative diagnosis of gestational age is "an imperfect art," and because such information is "the crucial factor in setting a graduated fee," Cates writes that such a determination should "be based on objective criteria, such as postoperative measurements of fetal foot size." His price chart thus includes fetal foot length in millimeters for each gestational category.

Cates presents a number of "advantages" which he attributes to his proposal, and several potential problems as well. He states that the present system, in which abortion price tags tend to increase markedly at the end of the first trimester, "encourages delay *within* the first 12 weeks" and then penalizes the patient "if the delay takes the pregnancy beyond 12 weeks gestation." Noting that the 12th week is "not a major turning point," Cates concludes that one of the greatest benefits his plan offers is to "encourage the woman to seek an abortion as soon as possible" and to "promote abortions at earlier and safer gestational ages."

The article also claims that the quality of pathological review might be enhanced because of the absolute necessity of examining the fetus, and that ectopic (tubal) pregnancies, incomplete abortions, and similar problems would be brought to the immediate attention of the clinic's surgical staff. Cates adds that certain complications could then be reduced, that more accurate medical records would be kept, and that providers' insurance costs might also be lowered. He further states that the scheme would lead to a more educational type of counseling, thereby "minimizing any resentment a woman might feel about the cost of the abortion." And, finally, Cates suggests that "the graduated-fee system might help dispel rumors about clinics' greater interest in profit than in patient care."

On the negative side, Cates concedes that monitoring of abortion facilities might become necessary because "greedy clinics could abuse the (system) by claiming that gestational age is greater than it actually is."

Another problem which Cates foresees is "additional risk of psychologic morbidity." This, he notes, is a consequence of using "postabortal fetal measurements to determine gestational age" — a practice which tends to intrude "on the subconscious pattern of denial that surrounds decisions to terminate pregnancies." For this reason, Cates suggests that other objective criteria be considered as alternatives to fetal foot measurements should the latter prove "unduly traumatic." His solution: crown-to-rump length and fetal weight.

NATIONAL RIGHT TO LIFE NEWS
October 27, 1980

Synopsis: The federal government's chief abortion surveillance official, Dr. Willard Cates of the Center for Disease Control, suggested sliding fee scales for abortions, based upon the length of the fetal foot. Among other advantages, this would lessen the incidence of incomplete abortions (the abortionist would not want to risk leaving the foot in the womb, you see) and encourage better recordkeeping, the doctor said. (Cates' suggestions appeared in the July/August 1980 issue of Family Planning Perspectives, a publication of the Alan Guttmacher Institute, which is Planned Parenthood's research affiliate.)

(FROM FAMILY PLANNING PERSPECTIVES, JULY/AUGUST 1980

Controversy

For a Graduated Scale of Fees for Legal Abortion

By Willard Cates, Jr.

What yardstick to use to set fair and equitable charges for specific medical procedures is a subject of continuing debate. No consensus has been arrived at by physicians concerning the appropriate fee for tonsillectomies or hysterectomies, two surgical interventions that have been common in our society for the past half century. It is hardly surprising, therefore, that there are questions concerning not only what constitutes fair and equitable charges for abortion, a relative newcomer to the medical care system, but how such costs should be arrived at. A recent national study shows that the charge for a first-trimester outpatient abortion performed in an abortion clinic is about $165, while the same type of abortion performed in a hospital costs about $250, exclusive of the surgeon's fee—which may add an additional $160–$250; the cost of a second-trimester procedure may be two or three times that of a first-trimester abortion.[1]

This leap in abortion fees between the first and second trimesters was initially related to differences in abortion procedures performed before and after 12 weeks following the last menstrual period. In the early 1970s, it was widely held that curettage procedures should be performed only at 12 or fewer weeks' gestation, and instillation procedures thereafter. However, the development of dilatation and evacuation, a safer and less traumatic procedure for the patient who requires a second-trimester abortion, has largely eliminated the need for instillation. Yet the fee system spawned by the difference between curettage and instillation lingers on.

The trimester approach to abortion fees does not, in reality, take into account either the difficulty of the procedure or the risk of complication. The length of time required to perform an abortion procedure and the risk of complications should be viewed as a continuum. The more advanced the pregnancy at the time of the abortion, the longer the procedure and the higher the risk of complications. The 12-week threshold is not a major turning point. In fact, the difference between 12 and 13 weeks' gestation is simply one day, namely between the 90th and 91st day after the last menstrual period.

The trimester-fee approach encourages delay *within* the first 12 weeks. Thus, the patient can delay deciding whether or not to have an abortion without incurring any increased cost, while the facility can delay scheduling without losing any income. Whatever the reason for the delay, the risks of the procedure are increased. Moreover, if the delay takes the pregnancy beyond 12 weeks' gestation, the doubling of the fee is an excessive penalty, borne only by the patient.

Two recent events illustrate the difficulties inherent in the current fee-setting system:

- A multiparous woman requested an abortion from a freestanding clinic, explaining that nine weeks had elapsed since her last menstrual period. The clinician judged from the size of her uterus that the woman was 14 weeks pregnant. She was told that the procedure would cost $375 rather than $175—the charge for a first-trimester abortion. She attempted a self-induced abortion, and suffered complications, following which she returned to the clinic. After the pregnancy was terminated, measurement of the fetal tissue showed that she had actually been nine weeks pregnant at the time she initially requested her abortion.
- A nulliparous, moderately obese woman requested an abortion from her family physician 10 weeks after her last menstrual period; he confirmed that she was 10 weeks pregnant, and immediately referred her to a nearby abortion facility. However, because the clinic was overscheduled, the next available appointment was two weeks later. When the woman came in at that time, the clinic physician estimated that she was 14 weeks pregnant. Because the state law requires that all abortions after 12 weeks' gestation be performed in hospitals, the clinic referred her to the local community hospital. The cost of the prostaglandin instillation procedure that was performed was more than $600; had the clinic accepted her for treatment when she was referred originally, she could have undergone a suction curettage at a cost of $150.

These experiences highlight several problems involved in the delivery of abortion services. Determining gestational age is an imperfect art, resulting in wide fluctuations in the estimates of the duration of pregnancy; in one instance, the estimate was too high, in the other, too low. Both misestimates resulted in unfortunate outcomes for the women. Although the abortion facility, in one instance, was responsible for the delay, the financial penalty was paid by the woman; the clinic accepted none of the responsibility.

I suggest that in the interest of public health and fair play, the trimester-fee approach be replaced by a graduated-fee approach for all abortions performed in outpatient clinics. Such an approach is based on the degree of difficulty of the procedure, the skill required of the clinician, the equipment necessary, the time required for the operation, and the risks of morbidity and mortality from the procedure.

The graduated-fee approach would be scaled to the length of gestation, and thus would directly reflect the difficulty and risks of the procedure. The determination of the actual gestational age would be based on objective criteria, such as postoperative measurements of fetal foot size. A baseline fee would be established, and the fee for the abortion would increase with the length of gestation, as is shown (for illustrative purposes only) in Table 1. The level of the baseline shown is taken from the average

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Willard Cates, Jr., is Chief of the Abortion Surveillance Branch at the Center for Disease Control in Atlanta, Georgia. A somewhat different version of these remarks was presented at the third annual meeting of the National Abortion Federation on July 16, 1979. The author wishes to thank David A. Grimes, Howard W. Ory, Carl W. Tyler, Jr., Cheri Rolnick and Sadja Greenwood for their comments and suggestions.

first-trimester fee charged in 1979 by members of the National Abortion Federation.[2]

The graduated-fee approach would have a significant public health benefit. Vigorous educational efforts to explain the importance of gestational age (that any delay after six weeks' gestation increases the risks of morbidity and mortality) and the precision with which that can be established would promote early decision-making by the woman. The increasing fee would encourage the woman to seek an abortion as early as possible. To discourage administrative delays by the facility, the fee could be set when the woman first contacts the abortion clinic, rather than when the procedure is performed. The net effect of reducing both patient and facility delay would be to promote abortions at earlier and safer gestational ages.

Problems in Implementation

Numerous problems must be resolved before a graduated-fee approach can be implemented. Among them are the following:

- determining a baseline fee,
- selecting the proper time-frame for specifying gestational age,
- setting an index gestational age,
- establishing objective measures of gestational age,
- providing routine methods for inspecting the products of conception,
- avoiding inflicting emotional trauma on the patient,
- establishing procedures for collecting abortion fees, and
- monitoring facilities to avoid abuse.

The determination of the baseline fee and of the marginal increase for each subsequent week of gestation can be made by using actuarial analyses based on the gestational distribution typical of a particular facility, the average cost per procedure and the profit margin required to maintain an acceptable operating revenue. Evaluations of the baseline fee can be made on an annual basis, and adjustments made as necessary.

Table 1. Graduated fees for abortion, by menstrual weeks of gestation and fetal foot measurement

Weeks of gestation	Fetal foot length (mm)*	Cost
≤6	Negative pregnancy test	$175
7–8	≤4.5	$160 (baseline)
9–10	4.6– 7.0	$175
11–12	7.1–11.5	$200
13–14	11.6–17.0	$225
15–16	17.1–23.0	$250
17–18	23.1–30.0	$275
≥19	≥30.1	$300

*Measurements adjusted to nearest 0.5 mm for ease of determination.

The selection of the time-frame for specifying gestational age should not penalize the patient for any scheduling difficulties imposed on her by the facility. Therefore, it would be preferable to base the fee on the gestational age at the time the patient first contacts the facility. For example, if objective measures determine that the woman's gestational age is 12 weeks, but she requested the procedure at the clinic two weeks earlier, then the fee should be set at the 10-week level.

The proper index gestational age at which to set the baseline fee should be that interval requiring the least amount of operative time and having the lowest complication rate. Several large studies have determined that the time required to perform abortions at six or fewer weeks and the risks associated with such early terminations are slightly greater than those associated with abortion at 7–8 weeks;[3] failed or incomplete procedures are more common at the very early stage of pregnancy. There is also a greater likelihood that the woman may not be pregnant. Thus, the index gestational age should probably be 7–8 weeks, with fees slightly higher at six or fewer weeks and at 9–10 weeks, and gradually increasing thereafter.

The objective measurement of gestational age is the crucial factor in setting a graduated fee. The measures—such as fetal foot length, crown-rump length, biparietal diameter, weight of the products of conception, and other postabortion measurements—must be explained thoroughly during the counseling session; ideally, the fees should be clearly displayed within the area where payment is collected. Alternately, the fee could be linked to the amount of dilatation necessary, and the expense of the equipment used.

The use of postabortion fetal measurements to determine gestational age could have a negative emotional impact on the patient by intruding on the subconscious pattern of denial that surrounds decisions to terminate pregnancies. (In fact, this could pose an additional risk of psychologic morbidity.) Abortion facilities must be sensitive to this issue, and be prepared to change objective measures if one of them proves to be unduly traumatic.

The process of collecting the abortion fee is perhaps the stickiest logistic wicket affecting implementation of a graduated-fee system. One solution might be to require deposit of a maximum fee based on an estimate of gestational age prior to the procedure. Following the abortion, the actual fee would be ascertained from the objective parameters, and the difference settled. Experience suggests that in about two-thirds of the cases, preoperative and postoperative estimates would be the same. However, for about one-third of the patients, estimates might be too high or too low. While few patients would complain about receiving a refund, many might object to paying additional fees after the procedure has been completed.

Although greedy clinics could abuse the graduated-fee approach by claiming that gestational age is greater than it actually is, the trimester approach is also subject to abuse, albeit only between the 12th and 13th week of pregnancy. By using an objective postabortion measure, the risk of provider abuse is lessened. Perhaps the National Abortion Federation or another group could act as a monitoring institution to handle complaints of overcharging.

Advantages

Since the problems in implementing a graduated-fee system are substantial, what benefits could accrue to providers willing to undertake such an approach?

With the graduated-fee system, the abortion procedure will involve the routine review of all presumed products of conception for evidence of secundine tissue. If inadequate tissue is obtained, reexamination and recurettage can be performed at once. Routine tissue review also makes possible the early diagnosis of such conditions as ectopic pregnancy, nonpregnancy, incomplete or failed abortion, uterine perforation, and congenital uterine anomalies. The woman can be counseled immediately, and this will pay dividends in reducing abortion complications, a by-product of tissue examination that has been reported elsewhere.[4]

In explaining the basis for a graduated-fee scale, the clinic can help educate a woman about various aspects of reproductive function. The differences between menstrual and conceptional dates can be elucidated, and the problems of determining gestational age can be discussed. One consequence may be the minimizing of any resentment a woman might feel about the cost of the abortion.

The community's image of the abortion provider could be positively influenced if the provider publicized the reasons for adopting the graduated-fee system. This might help dispel rumors about clinics' greater interest in profit than in patient care.

Encouraging early decision-making by the woman and reducing administrative delays by the clinic will, on average, lead to earlier performance of abortions. The clinic's overall complication rate will be reduced, perhaps translating into reduced insurance costs.

Since the graduated-fee approach requires the clinic to describe the products of conception as part of the billing process, the pregnancy will be confirmed and the objective measurement noted on both the medical record and the financial accounting form. The clinic will thus have some protection against claims of unnecessary or failed abortions and inadequate diagnosis of ectopic pregnancy.

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4. M. S. Burnhill, 1979, op. cit.

Against a Graduated Scale

By Judith Widdicombe

Willard Cates has presented a stimulating idea for abortion providers to think about, since fee scales are not writ in stone and should be adjusted when the situation requires it. However, I have reservations about Cates's proposal—which I think is both simplistic and unrealistic. For one thing, I believe that Cates is much too sanguine about the precision with which gestational age can be ascertained, new tools and techniques notwithstanding. Clinicians simply do not have enough experience with ultrasound or with the measurements of fetal tissue or foot length to be certain that their findings are correct within the very narrow limits required by the graduated-fee scale. And the importance of the initial bimanual examination, despite its limitations, has been downplayed by Cates, possibly because he is somewhat remote from the steps that women who believe themselves pregnant take before they decide to have a pregnancy terminated: They go to a hospital, a private doctor or an abortion clinic for a pregnancy test. If the test results are positive, they try to find out just how many weeks pregnant they are. It is at this point that the bimanual examination is important. Few physicians or clinics now have ultrasound equipment on their premises. Is it really practical to suggest that women be referred to a hospital or radiologist for yet another examination? What will this mean in terms of time and expense, both of which are of great importance to women in this situation? It seems to me far more practical for a physician or counselor to explain the bimanual findings as carefully as possible, making clear the urgency of swift decision-making to avoid undue delay. Women have learned the importance of early terminations to both their health and their pocketbooks, and more than 90 percent of abortions are now performed in the first 12 weeks. By comparison, in 1973, 85 percent were performed in the first trimester.[1]

The great value of the techniques used to determine gestational age is, as Cates points out, that they provide an indicator of possible complications such as ectopic pregnancy and incomplete abortion, and they do so while the woman is still available for treatment (or referral for treatment, in the case of ectopic pregnancy). But Cates does not address the question of the possible risks to the fetus associated with radiation from ultrasound used routinely at a very early stage of pregnancy—a time when some women have not yet decided whether to carry their pregnancies to term or to have them terminated. The risks must be weighed in considering any proposal to use ultrasound routinely as a diagnostic tool.

In my view, the graduated-fee scale is an administrative nightmare. Most ambulatory facilities schedule payment of fees before the procedure is carried out. Public health experts and consumer advocates have been urging for years that persons seeking medical care learn in advance what a given procedure or treatment will cost. Now a recommendation is made that women be told that the fee cannot be set until after they have undergone a procedure. Cates's system would require several clerical transactions instead of one. This would inevitably increase costs, as would the purchase of ultrasound equipment by every facility and every doctor providing abortions. I question whether the additional cost is worthwhile. Finally, given the real world, I wonder how sensible it is to propose open-ended fees. I doubt that women will be happy about being approached after an abortion with the news that the duration of the gestation was later than had been expected and that an additional amount is owed.

In concentrating on the medical aspects of abortion, Cates has dealt somewhat too lightly with the psychological trauma that could be inflicted by descriptions of fetal foot length or weighing of the products of conception. After years of experience in abortion clinics, I doubt that this could be done benignly, despite the best will and effort in the world. Is it sound to push a woman into making a decision about abortion on the basis of cost alone? This seems to me too mechanistic. Many women need time to arrive at a decision that they won't regret; they need counseling to help them evaluate their choices; they need time to resolve conflicts. Abortion is much more than simply an economic issue for most women.

The problem of scheduling by abortion facilities is indeed a daunting one, and there is no easy solution. For one thing, fertility patterns appear to peak at certain months; it should certainly be a facility's practice to refer women to other providers if an undue delay seems necessary for this reason or any other. To do otherwise is unconscionable. Cates's proposal should stimulate providers, including clinics and private physicians, to coordinate their activities to ensure the least delay for women. Providing expanded sessions during periods of increased demand is another route to eliminating delay.

If Cates's proposal does nothing more than to stimulate discussion of how best to provide optimum care to women at prices that are within bounds, he will have done a service to the field. We can do no less than to deal thoughtfully with the issues he has raised.

Reference

1. J. D. Forrest, E. Sullivan and C. Tietze, "Abortions in the United States, 1977–1978," *Family Planning Perspectives*, 11:329, 1979.

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The Wages of Crying Wolf: A Comment on *Roe* v. *Wade*

John Hart Ely*

> The interests of the mother and the fetus are opposed. On which side should the State throw its weight? The issue is volatile; and it is resolved by the moral code which an individual has.[1]

In *Roe v. Wade*,[2] decided January 22, 1973, the Supreme Court—Justice Blackmun speaking for everyone but Justices White and Rehnquist[3]—held unconstitutional Texas's (and virtually every other state's[4]) criminal abortion statute. The broad outlines of its argument are not difficult to make out:

1. The right to privacy, though not explicitly mentioned in the Constitution, is protected by the Due Process Clause of the Fourteenth Amendment.[5]

2. This right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[6]

3. This right to an abortion is "fundamental" and can therefore be regulated only on the basis of a "compelling" state interest.[7]

4. The state does have two "important and legitimate" interests here,[8] the first in protecting maternal health, the second in protecting the life (or potential life[9]) of the fetus.[10] But neither can be counted "compelling" throughout the entire pregnancy: Each matures with the unborn child.

These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."[11]

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[1] United States v. Vuitch, 402 U.S. 62, 80 (1971) (Douglas, J., dissenting in part).

[2] 93 S. Ct. 705 (1973).

[3] Were the dissents adequate, this comment would be unnecessary. But each is so brief as to signal no particular conviction that *Roe* represents an important, or unusually dangerous, constitutional development.

[4] *See* 93 S. Ct. at 709-10 n.2. *See also* Doe v. Bolton, 93 S. Ct. 739, 742 (1973).

[5] *Id.* at 727. *But cf.* note 58 *infra.*

[6] 93 S. Ct. at 727.

[7] *Id.* at 728.

[8] *Id.* at 731.

[9] The Court indicates that the constitutional issue is not to be solved by attempting to answer "the difficult question of when life begins." *Id.* at 730. *See also id.* at 725. *But see* pp. 925-26 *infra.*

[10] The suggestion that the interest in protecting prenatal life should not be considered because the original legislative history of most laws restricting abortion concerned itself with maternal health, *see* 93 S. Ct. at 725-26, is rightly rejected—by clear implication in *Roe* and rather explicitly in *Doe. Id.* at 747.

5. During the first trimester of pregnancy, neither interest is sufficiently compelling to justify any interference with the decision of the woman and her physician. Appellants have referred the Court to medical data indicating that mortality rates for women undergoing early abortions, where abortion is legal, "appear to be as low as or lower than the rates for normal childbirth."[12] Thus the state's interest in protecting maternal health is not compelling during the first trimester. Since the interest in protecting the fetus is not yet compelling either,[13] during the first trimester the state can neither prohibit an abortion nor regulate the conditions under which one is performed.[14]

6. As we move into the second trimester, the interest in protecting the fetus remains less than compelling, and the decision to have an abortion thus continues to control. However, at this point the health risks of abortion begin to exceed those of childbirth. "It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[15] Abortion may not be prohibited during the second trimester, however.[16]

7. At the point at which the fetus becomes viable[17] the interest in protecting it becomes compelling,[18] and therefore from that point on the state can prohibit abortions *except*—and this limitation is also apparently a constitutional command, though it receives no justification in the opinion—when they are necessary to protect maternal life or health.[19]

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[11] *Id.* at 731.

[12] *Id.* at 725. *But cf.* note 117 *infra.*

[13] *See* pp. 925-26 *infra.*

[14] *See* 93 S. Ct. at 732. *But see* note 117 *infra.*

[15] 93 S. Ct. at 732. *But see* note 117 *infra.*

[16] 93 S. Ct. at 732.

[17] This, the Court tells us, is somewhere between the twenty-fourth and twenty-eighth weeks. *Id.* at 730. *But cf.* p. 924 *infra.*

[18] *See* p. 924 *infra.*

[19] 93 S. Ct. at 732. (Thus the statutes of most states must be unconstitutional *even as applied to the final trimester*, since they permit abortion only for the purpose of saving the mother's life. *See id.* at 709.) This holding—that even after viability the mother's life *or health* (which presumably is to be defined very broadly indeed, so as to include what many might regard as the mother's convenience, *see* 93 S. Ct. at 755 (Burger, C.J., concurring)); United States v. Vuitch, 402 U.S. 62 (1971), must, as a matter of constitutional law, take precedence over what the Court seems prepared to grant at this point has become the fetus's *life, see* p. 924 *infra*—seems to me at least as controversial as its holding respecting the period prior to viability. (Typically, of course, one is not privileged even statutorily, let alone constitutionally, to take another's life in order to save his own life, much less his health.) Since, however, the Court does not see fit to defend this aspect of its decision at all, there is not a great deal that can be said by way of criticism.

I

A number of fairly standard criticisms can be made of *Roe*. A plausible narrower basis of decision, that of vagueness, is brushed aside in the rush toward broader ground.[20] The opinion strikes the reader initially as a sort of guidebook, addressing questions not before the Court and drawing lines with an apparent precision one generally associates with a commissioner's regulations.[21] On closer examination, however, the precision proves largely illusory. Confusing signals are emitted, particularly with respect to the nature of the doctor's responsibilities[22] and the permissible scope of health regulations after the first trimester.[23] The Court seems, moreover, to get carried away on the subject of remedies: Even assuming the case can be made for an unusually protected constitutional right to an abortion, it hardly seems necessary to have banned during the first trimester *all* state regulation of the conditions under which abortions can be performed.[24]

By terming such criticisms "standard," I do not mean to suggest they are unimportant, for they are not. But if they were all that was wrong with *Roe,* it would not merit special comment.[25]

[20] The Court's theory seems to be that narrow grounds need not be considered when there is a broad one that will do the trick: "This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness." 93 S. Ct. at 732. *Compare id.* at 710 n.3, 710-11; Doe v. Bolton, 93 S. Ct. at 747; Roe v. Wade, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970); cases cited 93 S. Ct. at 727; and United States v. Vuitch, 402 U.S. 62 (1971), bearing in mind that the Supreme Court lacks jurisdiction to "construe" a state statute so as to save it from the vice of vagueness.

[21] *See also* Doe v. Bolton, 93 S. Ct. 739 (1973).

[22] Apparently doctors are expected, or at least can be required despite the decisions, to exercise their best "medical" or "clinical" judgment (and presumably can be prosecuted if they perform abortions conflicting with that judgment). 93 S. Ct. at 747, 751. *But cf.* United States v. Vuitch, 402 U.S. 62, 97 (Stewart, J., dissenting in part). But if it is unconstitutional to limit the justifications for an abortion to considerations of maternal life and health, what kind of "medical' judgment does the Court have in mind? *See* Stone, *Abortion and the Supreme Court,* MODERN MEDICINE (forthcoming 1973): "[T]here are no clear medical indications for abortion in the vast majority of cases. Where there are no indications, there is no room for clinical judgment."

[23] *Compare* 93 S. Ct. at 732 *with id.* at 748-51. An additional element of confusion may have been injected by Justice Douglas's indication in his concurrence that "quickening" is the point at which the interest in protecting the fetus becomes compelling. *Id.* at 759. *But see id.* at 730, where the Court distinguishes quickening from viability and holds the latter to be the crucial point. *See also id.* at 732; p. 924 *infra.*

[24] The state *can* require that the abortion be performed by a doctor, but that is all. *But see* note 117 *infra.* Even after the first trimester, the limits on state regulation of the conditions under which an abortion can be performed are extremely stringent. *See* Doe v. Bolton, 93 S. Ct. 739 (1973).

[25] With respect to the capital punishment litigation too, the Court rejected a narrow ground of invalidation one term only to come back with a *coup de main* the next. *Compare* McGautha v. California, 402 U.S. 183 (1971) *with* Furman v. Georgia, 408 U.S. 238 (1972). Miranda v. Arizona, 384 U.S. 436 (1966), has something of a "guidebook" quality about it. *See* Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1210 (1971). United States v. Wade, 388 U.S. 218 (1967), to take but one example, has always struck

II

Let us not underestimate what is at stake: Having an unwanted child can go a long way toward ruining a woman's life.[26] And at bottom *Roe* signals the Court's judgment that this result cannot be justified by any good that anti-abortion legislation accomplishes. This surely is an understandable conclusion—indeed it is one with which I agree[27]—but ordinarily the Court claims no mandate to second-guess legislative balances, at least not when the Constitution has designated neither of the values in conflict as entitled to special protection.[28] But even assuming it would be a good idea for the Court to assume this function, *Roe* seems a curious place to have begun. Laws prohibiting the use of "soft" drugs or, even more obviously, homosexual acts between consenting adults can stunt "the preferred life styles"[29] of those against whom enforcement is threatened in very serious ways. It is clear such acts harm no one besides the participants, and indeed the case that the participants are harmed is a rather shaky one.[30] Yet such laws survive,[31] on the theory that there exists a societal consensus that the behavior involved is revolting or at any rate immoral.[32] Of course the consensus is not universal but it is sufficient, and this is what is counted

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me as a case where the Court, starting from the entirely valid realization that trials cannot be fair if lineups are not, went a bit far in limiting the appropriate remedies. And of course many opinions have emitted confusing signals respecting what is henceforth permissible. *See, e.g.*, pp. 929-30 *infra*.

[26] The child may not fare so well either. Of course the Court requires of the mother neither sort of showing, though it may be hoping the doctors will do so. *But cf.* note 22 *supra*.

It is also probably the case, although this is the sort of issue where reliable statistics and comparisons are largely unobtainable, that a number of women have died from illegal abortions who would have lived had they been able to secure legal abortions. It is a strange argument for the unconstitutionality of a law that those who evade it suffer, but it is one that must nevertheless be weighed in the balance as a cost of anti-abortion legislation. The Court does not mention it, however; and given the severe restrictions it places on state regulation of the conditions under which an abortion can be performed, it apparently did not appreciably inform its judgment.

[27] *See* pp. 926-27 *infra*.

[28] *See* pp. 926-37 *infra*. Even where the Constitution does single out one of the values for special protection, the Court has shown an increasing tendency to avoid balancing, or at least to talk as though it were. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). *See also* United States v. Robel, 389 U.S. 258, 268 n.20 (1967); *but see* Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 467-68 (1969). *See also* United States v. O'Brien, 391 U.S. 367, 376-77 (1968); *but cf.* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1340-41 (1970).

[29] 93 S. Ct. at 759 (Douglas, J., concurring).

[30] The claim that the participants are injuring their health seems at least as plausible respecting abortion. *Cf.* note 117 *infra*. To the extent that the use of soft drugs and homosexual activities interfere with the lives of those other than the participants, those interferences can be dealt with discretely.

[31] *Cf.* Poe v. Ullman, 367 U.S. 497, 551-53 (1961), (Harlan, J., dissenting), *quoted* in part in Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring), distinguishing laws proscribing homosexual acts (even those performed in the home) as not involving the "right" at stake in those cases.

[32] *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 545-46 (Harlan, J., dissenting).

crucial, to get the laws passed and keep them on the books. Whether anti-abortion legislation cramps the life style of an unwilling mother more significantly than anti-homosexuality legislation cramps the life style of a homosexual is a close question. But even granting that it does, the *other* side of the balance looks very different. For there is more than simple societal revulsion to support legislation restricting abortion:[33] Abortion ends (or if it makes a difference, prevents) the life of a human being other than the one making the choice.

The Court's response here is simply not adequate. It agrees, indeed it holds, that after the point of viability (a concept it fails to note will become even less clear than it is now as the technology of birth continues to develop[34]) the interest in protecting the fetus is compelling.[35] Exactly why that is the magic moment is not made clear: Viability, as the Court defines it,[36] is achieved some six to twelve weeks after quickening.[37] (Quickening is the point at which the fetus begins discernibly to move independently of the mother[38] and the point that has historically been deemed crucial—to the extent *any* point between conception and birth has been focused on.[39]) But no, it is *viability* that is constitutionally critical: the Court's defense seems to mistake a definition for a syllogism.

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capacity of meaningful life outside the mother's womb.[40]

With regard to why the state cannot consider this "important and legitimate interest" prior to viability, the opinion is even less satisfactory. The discussion begins sensibly enough: The interest asserted is not necessarily tied to the question whether the fetus is "alive," for whether or not one calls it a living being, it is an entity with the potential for (and indeed the likelihood of) life.[41] But all of arguable relevance that follows[42] are arguments that fetuses (a) are not recognized as "persons in the whole sense" by legal doctrine generally[43] and (b) are not "persons" protected by the Fourteenth Amendment.[44]

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[33] Nor is the Court's conclusion that early abortion does not present serious physical risk to the woman involved shared by all doctors. *Cf.* note 117 *infra.*

[34] It defines viability so as not to exclude the possibility of artificial support, 93 S. Ct. at 730, and later indicates its awareness of the continuing development of artificial wombs. *Id.* at 731. It gives no sign of having considered the implications of that combination for the trimester program the Constitution is held to mandate, however.

[35] Albeit not so compelling that a state is permitted to honor it at the expense of the mother's health. *See* note 19 *supra.*

[36] Note 17 *supra.*

[37] *See* 93 S. Ct. at 716.

[38] *Id.*

[39] *Id.* at 716-20.

[40] *Id.* at 732. *See also id.* at 730:

> Physicians and their scientific colleagues have regarded [quickening] with less interest and have tended to focus either upon conception or upon live birth or upon the interim point at which the fetus becomes "viable," . . . .

The relevance of this observation is not explained. It is, moreover, of questionable validity:

> This line is drawn beyond quickening, beyond the point where any religion has assumed that life begins, beyond the time when abortion is a simple procedure, and beyond the point when most physicians and nurses will feel the procedure is victimless. It is also beyond the point which would have satisfied many who, like myself, were long term supporters of the right to abortion.

Stone, *supra* note 22.

To the extent they are not entirely inconclusive, the bodies of doctrine to which the Court adverts respecting the protection of fetuses under general legal doctrine tend to undercut rather than support its conclusion.[45] And the argument that fetuses (unlike, say, corporations) are not "persons" under the Fourteenth Amendment fares little better. The Court notes that most constitutional clauses using the word "persons"—such as the one outlining the qualifications for the Presidency—appear to have been drafted with postnatal beings in mind. (It might have added that most of them were plainly drafted with

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[41]

> Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

93 S. Ct. at 725. *See also id.* at 730:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point [sic] in the development of man's knowledge, is not in a position to speculate as to the answer.

The Texas statute, like those of many states, had declared fetuses to be living beings. *See id.* at 709 n.1, 710 n.3; *cf. id.* at 721, 723 n.40, 729 n.55.

[42] The opinion does contain a lengthy survey of "historical attitudes" toward abortion, culminating in a discussion of the positions of the American Medical Association, the American Public Health Association, and the American Bar Association. *Id.* at 715-24. (The discussion's high point is probably reached where the Court explains away the Hippocratic Oath's prohibition of abortion on the grounds that Hippocrates was a Pythagorean, and Pythagoreans were a minority. *Id.* at 715-16.) The Court does not seem entirely clear as to what this discussion has to do with the legal argument, *id.* at 709, 715, and the reader is left in much the same quandary. It surely does not seem to support the Court's position, unless a record of serious historical and contemporary dispute is somehow thought to generate a constitutional mandate.

[43] *Id.* at 731.

[44] *Id.* at 728-30.

[45]

> [T]he traditional rule of tort law had denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held. In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*. Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

Id. at 731 (footnotes omitted). *See also, e.g.*, W. Prosser, Handbook of the Law of Torts 355 (3d ed. 1964).

adults in mind, but I suppose that wouldn't have helped.) In addition, "the appellee conceded on reargument that no case can be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment."[46] (The other legal contexts in which the question could have arisen are not enumerated.)

The canons of construction employed here are perhaps most intriguing when they are contrasted with those invoked to derive the constitutional right to an abortion.[47] But in any event, the argument that fetuses lack constitutional rights is simply irrelevant. For it has never been held or even asserted that the state interest needed to justify forcing a person to refrain from an activity, *whether or not that activity is constitutionally protected*, must implicate either the life or the constitutional rights of another person.[48] Dogs are not "persons in the whole sense" nor have they constitutional rights, but that does not mean the state cannot prohibit killing them: It does not even mean the state cannot prohibit killing them in the exercise of the First Amendment right of political protest. Come to think of it, draft cards aren't persons either.[49]

Thus even assuming the Court ought generally to get into the business of second-guessing legislative balances, it has picked a strange case with which to begin. Its purported evaluation of the balance that produced anti-abortion legislation simply does not meet the issue: That the life plans of the mother must, not simply may, prevail over the state's desire to protect the fetus simply does not follow from the judgment that the fetus is not a person. Beyond all that, however, the Court has no business getting into that business.

III

Were I a legislator I would vote for a statute very much like the one the Court ends up drafting.[50] I hope this reaction reflects more

[46] *Id.* at 728-29 (footnote omitted).

[47] *See* pp. 928-33 *infra.*

[48] Indeed it is difficult to think of a single instance where the justification given for upholding a governmental limitation of a protected right has involved the constitutional rights of others. A "free press-fair trial" situation might provide the basis for such an order, but thus far the Court has refused to approve one. *See* Ely, *Trial by Newspaper & Its Cures*, ENCOUNTER, March 1967, at 80-92.

In the Court's defense it should be noted that it errs in the other direction as well, by suggesting that if a fetus *were* a person protected by the Fourteenth Amendment, it would necessarily follow that appellants would lose. 93 S. Ct. at 728. Yet in fact all that would thereby be established is that one right granted special protection by the Fourteenth Amendment was in conflict with what the Court felt was another; it would not tell us which must prevail.

[49] *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968). And if you don't like that example, substitute post offices for draft cards.

[50] I would, however, omit the serious restrictions the Court puts on state health regulation of the conditions under which an abortion can be performed, and give

than the psychological phenomenon that keeps bombardiers sane—the fact that it is somehow easier to "terminate" those you cannot see—and am inclined to think it does: that the mother, unlike the unborn child, has begun to imagine a future for herself strikes me as morally quite significant. But God knows I'm not *happy* with that resolution. Abortion is too much like infanticide on the one hand, and too much like contraception on the other, to leave one comfortable with any answer; and the moral issue it poses is as fiendish as any philosopher's hypothetical.[51]

Of course, the Court often resolves difficult moral questions, and difficult questions yield controversial answers. I doubt, for example, that most people would agree that letting a drug peddler go unapprehended is morally preferable to letting the police kick down his door without probable cause. The difference, of course, is that the Constitution, which legitimates and theoretically controls judicial intervention, has some rather pointed things to say about this choice. There will of course be difficult questions about the applicability of its language to specific facts, but at least the document's special concern with one of the values in conflict is manifest. It simply says nothing, clear or fuzzy, about abortion.[52]

The matter cannot end there, however. The Burger Court, like the Warren Court before it, has been especially solicitous of the right to travel from state to state, demanding a compelling state interest if it is to be inhibited.[53] Yet nowhere in the Constitution is such a right mentioned. It is, however, as clear as such things can be that this right was one the framers intended to protect, most specifically[54] by the Privileges and Immunities Clause of Article IV.[55] The right is, moreover, plausibly inferable from the system of government, and the citizen's role therein, contemplated by the Constitution.[56] The Court

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serious thought—though the practical difference here is not likely to be great—to placing the critical line at quickening rather than viability. *See* note 40 *supra*.

[51] Some of us who fought for the right to abortion did so with a divided spirit. We have always felt that the decision to abort was a human tragedy to be accepted only because an unwanted pregnancy was even more tragic.

Stone, *supra* note 22.

[52] Of course the opportunity to have an abortion should be considered part of the "liberty" protected by the Fourteenth Amendment. *See* p. 935 *infra*.

[53] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

[54] *See also* Edwards v. California, 314 U.S. 160 (1941).

[55] *See* United States v. Wheeler, 254 U.S. 281, 294 (1920); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 75 (1872); U.S. ARTS. CONFED. art. IV; 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (1911); *cf.* THE FEDERALIST, NO. 42, at 307 (Wright ed. 1961).

[56] *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867); C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). The Court seems to regard the opportunity to travel *outside* the United States as merely an aspect of the "liberty" that under the Fifth and Fourteenth Amendments cannot be denied without due process. *See* Zemel v. Rusk, 381 U.S. 1, 14 (1965). *Cf.* p. 935 *infra*.

in *Roe* suggests an inference of neither sort—from the intent of the framers,[57] or from the governmental system contemplated by the Constitution—in support of the constitutional right to an abortion.

What the Court does assert is that there is a general right of privacy granted special protection—that is, protection above and beyond the baseline requirement of "rationality"—by the Fourteenth Amendment,[58] and that that right "is broad enough to encompass" the right to an abortion. The general right of privacy is inferred, as it was in *Griswold v. Connecticut*,[59] from various provisions of the Bill of Rights manifesting a concern with privacy, notably the Fourth Amendment's guarantee against unreasonable searches, the Fifth Amendment's privilege against self-incrimination, and the right, inferred from the First Amendment, to keep one's political associations secret.[60]

One possible response is that all this proves is that the things explicitly mentioned are forbidden, if indeed it does not actually demonstrate a disposition *not* to enshrine anything that might be called a general right of privacy.[61] In fact the Court takes this view when it suits its purposes. (On the *same day* it decided *Roe*, the Court held that a showing of reasonableness was not needed to force someone to provide a grand jury with a voice exemplar, reasoning that the Fifth Amendment was not implicated because the evidence was not "testimonial" and that the Fourth Amendment did not apply because there was no "seizure."[62]) But this approach is unduly crabbed. Surely the Court is entitled, indeed I think it is obligated, to seek out the sorts of evils the framers meant to combat and to move against their twentieth century counterparts.[63]

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[57] Abortions had, of course, been performed, and intermittently proscribed, for centuries prior to the framing of the Constitution. That alone, however, need not be dispositive. *See* p. 929 *infra* & note 97 *infra*.

[58] The Court does not seem entirely certain about which provision protects the right to privacy and its included right to an abortion.

> Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras . . . or among those rights reserved to the people by the Ninth Amendment . . . .

93 S. Ct. at 715.

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 727. This inability to pigeonhole confidently the right involved is not important in and of itself. It might, however, have alerted the Court to what *is* an important question: whether the Constitution speaks to the matter at all.

[59] 381 U.S. 479 (1965).

[60] *See* NAACP v. Alabama, 357 U.S. 449 (1958), relied on in *Griswold*, 381 U.S. at 483. The *Roe* Court's reference to Justice Goldberg's concurrence in *Griswold* for the proposition that "the roots of" the right of privacy can be found in the Ninth Amendment, 93 S. Ct. at 726, misconceives the use the earlier opinion made of that Amendment. *See* 381 U.S. at 492-93. A reference to "the penumbras of the Bill of Rights," 93 S. Ct. at 726, can have no content independent of a description of some general value or values inferable from the provisions involved (and therefore assignable to their penumbras). *See* San Antonio Independent School Dist. v. Rodriguez, 41 U.S.L.W. 4407, 4438 (U.S. March 21, 1973) (Marshall, J., dissenting); pp. 929-30 *infra*.

[61] *See* Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 529 (Stewart, J., dissenting).

Thus it seems to me entirely proper to infer a general right of privacy, *so long as some care is taken in defining the sort of right the inference will support.* Those aspects of the First, Fourth and Fifth Amendments to which the Court refers all limit the ways in which, and the circumstances under which, the government can go about gathering information about a person he would rather it did not have.[64] *Katz v. United States*,[65] limiting governmental tapping of telephones, may not involve what the framers would have called a "search," but it plainly involves this general concern with privacy.[66] *Griswold* is a long step, even a leap, beyond this, but at least the connection is discernible. Had it been a case that purported to discover in the Constitution a "right to contraception," it would have been *Roe*'s strongest precedent.[67] But the Court in *Roe* gives no evidence of so regarding it,[68] and rightly not.[69] Commentators tend to forget, though the Court plainly has not,[70] that the Court in *Griswold* stressed that it was invalidating only that portion of the Connecticut law that proscribed the *use*, as opposed to the manufacture, sale, or other distribution of contraceptives. That distinction (which would be silly were the right to contraception being constitutionally enshrined) makes sense if the case is rationalized on the ground that the section of the law whose constitutionality was in issue was such that *its enforcement would have been virtually impossible without* the most outrageous sort of governmental prying into the privacy of the home.[71] And this, indeed, is the theory on which the Court appeared rather explicitly to settle:

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[62] United States v. Dionisio, 93 S. Ct. 764 (1973). *See also* United States v. Mara, 93 S. Ct. 774 (1973) (handwriting exemplars), also decided the same day as *Roe*, and Couch v. United States, 93 S. Ct. 611 (1973) (finding no privacy interest in records a taxpayer had turned over to her accountant) decided thirteen days earlier.

[63]
> [T]he proper scope of [a constitutional provision], and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate.

United States v. Brown, 381 U.S. 437, 442 (1965). *See also* Weems v. United States, 217 U.S. 349, 373 (1910); Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963); Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962).

[64] *Cf.* Fried, *Privacy*, 77 YALE L.J. 475 (1968). The Third Amendment, mentioned in *Griswold* though not in *Roe*, surely has this aspect to it as well, though it probably grew in even larger measure out of a general concern with the pervasiveness of military power.

[65] 389 U.S. 347 (1967).

[66] *Cf.* Schmerber v. California, 384 U.S. 757 (1966).

[67] Contraception and at least early abortion obviously have much in common. *See* Stone, *supra* note 22.

[68] The *Roe* opinion does not rely on the obvious contraception-abortion comparison and indeed gives no sign that it finds *Griswold* stronger precedent than a number of other cases. *See* 93 S. Ct. at 726-27; note 79 *infra*. In fact it seems to go out of its way to characterize *Griswold* and Eisenstadt v. Baird, 405 U.S. 438 (1972), as cases concerned with the privacy of the bedroom. *See* 93 S. Ct. at 730; note 79 *infra*. It is true that in *Eisenstadt* the Court at one point characterized *Griswold* as protecting the "decision whether to bear and beget a child," 405 U.S. at 453, but it also, mysteriously in light of that characterization, pointedly refused to decide whether the earlier case extended beyond use, to the distribution of contraceptives. *Id.* at 452-53. Nor is there any possibility the refusal to extend *Griswold* in this way was ill-considered; such an extension would have obviated the *Eisenstadt* Court's obviously strained performance respecting the Equal Protection Clause.

[69] Admittedly the *Griswold* opinion is vague and openended, but the language quoted in the text at note 72 *infra* seems plainly inconsistent with the view that it is a case not about likely invasions of the privacy of the bedroom but rather directly enshrining a right to contraception.

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[72]

Thus even assuming (as the Court surely seemed to) that a state can constitutionally seek to minimize or eliminate the circulation and use of contraceptives, Connecticut had acted unconstitutionally by selecting a means, that is a direct ban on use, that would generate intolerably intrusive modes of data-gathering.[73] No such rationalization is attempted by the Court in *Roe*—and understandably not, for whatever else may be involved, it is not a case about governmental snooping.[74]

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[70] *See* Eisenstadt v. Baird, 405 U.S. 438, 443 (1972). *Cf.* 93 S. Ct. at 730; note 79 *infra*.

[71] Stanley v. Georgia, 394 U.S. 557 (1969), cited by the Court in *Roe*, might also be rationalized on such a theory, *cf. id.* at 565, though it reads more like a "pure" First Amendment case concerned with governmental attempts at thought control.

[72] 381 U.S. at 485-86 (emphasis in original).

[73] *See also* Poe v. Ullman, 367 U.S. 497, 548-49, 553-54 (1961) (Harlan, J., dissenting). That the Court in *Griswold* saw fit to quote Boyd v. United States, 116 U.S. 616, 630 (1886), is also significant. *See* 381 U.S. at 484-85 n.*. *See also* United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting).

The theory suggested in Poe v. Ullman, *supra*, at 551-52 (Harlan, J., dissenting), extending heightened protection to activities (though it turns out to be *some* activities, note 31 *supra*) customarily performed in the home, is also inapplicable to *Roe*.

[74] Of course in individual cases the government might seek to enforce legislation restricting abortion, as indeed it might seek to enforce any law, in ways that violate the

The Court reports that some amici curiae argued for an unlimited right to do as one wishes with one's body. This theory holds, for me at any rate, much appeal. However, there would have been serious problems with its invocation in this case. In the first place, more than the mother's own body is involved in a decision to have an abortion; a fetus may not be a "person in the whole sense," but it is certainly not nothing.[75] Second, it is difficult to find a basis for thinking that the theory was meant to be given constitutional sanction: Surely it is no part of the "privacy" interest the Bill of Rights suggests.[76]

> [I]t is not clear to us that the claim . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy . . . .[77]

Unfortunately, having thus rejected the amici's attempt to define the bounds of the general constitutional right of which the right to an abortion is a part,[78] on the theory that the general right described has little to do with privacy, the Court provides neither an alternative definition[79] nor an account of why *it* thinks privacy is involved. It

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Fourth Amendment or otherwise intrude upon the general privacy interest the Bill of Rights suggests. The Court does not suggest, however, that the laws at issue in *Roe* are in any sense unusually calculated to generate such intrusions.

[75] *See* pp. 925-26 *supra*.

[76] *See* pp. 929-30 *supra*.

[77] 93 S. Ct. at 727.

[78] The Court's rejection of the "non-paternalism" argument is of course underlined by the health regulations it is prepared to allow during the second trimester, *before* the interest in protecting the fetus is cognizable. *See* p. 921 *supra*.

[79] The Court does assert that

> only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967), procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942), contraception, Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); *id.* at 460, 463-65 (White, J., concurring), family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944), and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska, [262 U.S. 390, 399 (1923)].

93 S. Ct. at 726-27. The *Palko* test was stated and has heretofore been taken as a definition (of questionable contemporary vitality) of due process generally, not of privacy. *Loving* was a case involving explicit racial discrimination and therefore decidable (and decided) by a rather straightforward application of the Equal Protection Clause. *See* Ely, *supra* note 28, at 1230. And while the *Loving* Court did, inexplicably, append a reference to due process, it did not mention privacy. *Skinner* invalidated the Oklahoma criminal sterilization act's distinction between larcenists and embezzlers. Although it too did not allude to privacy, it did suggest it was applying a higher equal protection standard than usual. Why it did so is unclear. "Faced with the possibility of a finding of cruel and unusual punishment and the virtual certainty of invalidation under the clause proscribing *ex post facto* laws, the state declined to argue the case on the theory that the . . . Act was a penal statute, and therefore tried to justify the distinction in 'regulatory' terms." Ely, *supra*, at 1235 n.101. That being so, the state was unable to come up with even a plausible justification for the distinction. *Eisenstadt* was a case applying "traditional" equal protection standards, albeit in a less than satisfactory way. *See* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). The

simply announces that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Apparently this conclusion is thought to derive from the passage that immediately follows it:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[80]

All of this is true and ought to be taken very seriously. But it has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests.[81] I suppose there is nothing to prevent one from using the word "privacy" to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term.[82] Nor could it, for such a right is at stake in *every* case. Our

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passage cited by the Court in *Roe* reiterated *Griswold*'s conclusion that privacy interests are threatened by a ban on the use of contraceptives, but declined to decide whether its rationale should be extended to restrictions on distribution. *See* p. 930 *supra*. *Prince* upheld the application of a child labor law to Jehovah's Witness children distributing religious literature. It did, however, reiterate the conclusion of *Pierce* and *Meyer* that family relationships are entitled to special protection. Those two cases are products of "the *Lochner* era," *see* pp. 937-43 *infra*. The vitality of the theory on which they rested has been questioned, Epperson v. Arkansas, 393 U.S. 97, 105-06 (1968), and the Court has attempted to recast them as First Amendment cases. Griswold v. Connecticut, 381 U.S. 479, 482 (1965); *cf.* Poe v. Ullman, 367 U.S. 497, 533-34 (1961) (Harlan, J., dissenting). Even reading the cases cited "for all that they are worth," it is difficult to isolate the "privacy" factor (or any other factor that seems constitutionally relevant) that unites them with each other and with *Roe*. So the Court seems to admit by indicating that privacy has "some extension" to the activities involved, and so it seems later to grant even more explicitly.

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus. . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt, Griswold, Stanley, Loving, Skinner, Pierce,* and *Meyer* were respectively concerned.

93 S. Ct. at 730.

[80] 93 S. Ct. at 727. *See also id.* at 757 (Douglas, J., concurring).

[81] It might be noted that most of the factors enumerated also apply to the inconvenience of having an unwanted two-year-old, or a senile parent, around. Would the Court find the constitutional right of privacy invaded in those situations too? I find it hard to believe it would; even if it did, of course, it would not find a constitutional right to "terminate" the annoyance—presumably because "real" persons are now involved. *But cf.* p. 926 *supra* & note 48 *supra*. But what about ways of removing the annoyance that do not involve "termination"? Can they really be matters of constitutional entitlement?

[82] *But cf.* 93 S. Ct. at 758-59 (Douglas, J., concurring).

life styles are constantly limited, often seriously, by governmental regulation; and while many of us would prefer less direction, granting that desire the status of a preferred constitutional right would yield a system of "government" virtually unrecognizable to us and only slightly more recognizable to our forefathers.[83] The Court's observations concerning the serious, life-shaping costs of having a child prove what might to the thoughtless have seemed unprovable: That even though a human life, or a potential human life, hangs in the balance, the moral dilemma abortion poses is so difficult as to be heartbreaking. What they fail to do is even begin to resolve that dilemma so far as our governmental system is concerned by associating either side of the balance with a value inferable from the Constitution.

But perhaps the inquiry should not end even there. In his famous *Carolene Products* footnote, Justice Stone suggested that the interests to which the Court can responsibly give extraordinary constitutional protection include not only those expressed in the Constitution but also those that are unlikely to receive adequate consideration in the political process, specifically the interests of "discrete and insular minorities" unable to form effective political alliances.[84] There can be little doubt that such considerations have influenced the direction, if only occasionally the rhetoric, of the recent Courts. My repeated efforts to convince my students that sex should be treated as a "suspect classification" have convinced me it is no easy matter to state such considerations in a "principled" way. But passing that problem, *Roe* is not an appropriate case for their invocation.

Compared with men, very few women sit in our legislatures, a fact I believe should bear some relevance—even without an Equal Rights Amendment—to the appropriate standard of review for legislation that favors men over women.[85] But *no* fetuses sit in our legislatures. Of course they have their champions, but so have women. The two interests have clashed repeatedly in the political arena, and had continued to do so up to the date of the opinion, generating quite a wide variety of accommodations.[86] By the Court's lights virtually all of the legislative accommodations had unduly favored fetuses; by its definition of victory, women had lost. Yet in every legislative balance one of the competing interests loses to some extent; indeed usually, as here, they both do. On some occasions the Constitution throws its weight on the side of one of them, indicating the balance must be restruck. And on others—and this is Justice Stone's suggestion—it is at least arguable that, constitutional directive or not, the Court should throw *its* weight on the side of a minority demanding in court more than it was able to achieve politically. But even assuming this suggestion can be given principled content, it was clearly intended and should be reserved for those interests which, *as compared with the interests to which they have been subordinated,* constitute minorities unusually incapable of protecting themselves.[87] Compared with men, women may constitute

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[83] *Cf.* Katz v. United States, 389 U.S. 347, 350-51 (1967).

[84] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[85] This is not the place for a full treatment of the subject, but the general idea is this: Classifications by sex like classifications by race, differ from the usual classification—to which the traditional "reasonable generalization" standard is properly applied—in that they rest on "we-they" generalizations as opposed to a "they-they" generalization. Take a familiar example of the usual approach, Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Of course few legislators are opticians. But few are optometrists either. Thus while a decision to distinguish opticians from optometrists will incorporate a stereotypical comparison of two classes of people, it is a comparison of two "they" stereotypes, *viz.* "They [opticians] are generally inferior to or not so well qualified as *they* [optometrists] are in the following respect(s), which we find sufficient to justify the classification: . . . ." However, legislators traditionally have not only not been black (or female); they have been white (and male). A decision to distinguish blacks from whites (or women from men) will therefore have its roots in a comparison between a "we" stereotype and a "they" stereotype, *viz.* "They [blacks or women] are generally inferior to or not so well qualified as *we* [whites or men] are in the following respect(s), which we find sufficient to justify the classification: . . . ."

The choice between classifying on the basis of a comparative generalization and attempting to come up with a more discriminating formula always involves balancing the increase in fairness which greater individualization will produce against the added costs it will entail. It is no startling psychological insight, however, that most of us are delighted to hear and prone to accept comparative characterizations of groups that suggest that the groups to which *we* belong are in some way superior to others. (I would be inclined to exclude most situations where the "we's" used to be "they's," *cf.* Ferguson v. Skrupa, 372 U.S. 726 (1963), and would therefore agree that the unchangeability of the distinguishing characteristic is indeed relevant, though it is only part of the story.) The danger is therefore greater in we-they situations that we will overestimate the validity of the proposed stereotypical classification by seizing upon the positive myths about our own class and the negative myths about theirs—or indeed the realities respecting some or most members of the two classes—and too readily assuming that virtually the entire membership of the two classes fit the stereotypes and therefore that not many of "them" will be unfairly deprived, nor many of "us" unfairly benefitted, by the proposed classification. In short, I trust your generalizations about the differences between my gang and Wilfred's more than I do your generalizations about the differences between my gang and yours.

Of course most judges, like most legislators, are white males, and there is no particular reason to suppose they are any more immune to the conscious and unconscious temptations that inhere in we-they generalizations. Obviously the factors mentioned can distort the evaluation of a classification fully as much as they can distort its formation. But all this is only to suggest that the Court has chosen the right course in reviewing classifications it has decided are suspicious—a course not of restriking or second-guessing the legislative cost-benefit balance but rather of demanding a congruence between the classification and its goal as perfect as practicable. When in a given situation you can't be trusted to generalize and I can't be trusted to generalize, the answer is not to generalize—so long as a bearable alternative exists. And here, the Court has recognized, one does—the alternative of forcing the system to absorb the additional cost that case by case determinations of qualification will entail. Legislatures incur this cost voluntarily in a great many situations, and courts have on other occasions forced them to do so where constitutionally protected interests will be threatened by an imperfectly fitting classification. The unusual dangers of distortion that inhere in a we-they process of comparative generalization, the Court seems to have been telling us in the racial classification cases, also demand that we bear the increased cost of individual justice.

[86] *See* 93 S. Ct. at 708-10, 720, 723-24, 742-43, 752-55.

[87] If the mere fact that the classification in issue disadvantages a minority whose viewpoint was not appreciated by a majority of the legislature that enacted it were sufficient to render it suspect, *all* classifications would be suspect.

such a "minority"; compared with the unborn, they do not.[88] I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I'd expect no credit for the former answer.[89]

Of course a woman's freedom to choose an abortion is part of the "liberty" the Fourteenth Amendment says shall not be denied without due process of law, as indeed is anyone's freedom to do what he wants. But "due process" generally guarantees only that the inhibition be procedurally fair and that it have some "rational" connection—though plausible is probably a better word[90]—with a permissible governmental goal.[91] What is unusual about *Roe* is that the liberty involved is accorded a far more stringent protection, so stringent that a desire to preserve the fetus's existence is unable to overcome it—a protection more stringent, I think it fair to say, than that the present Court accords the freedom of the press explicitly guaranteed by the First Amendment.[92] What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included,[93] or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected vis-à-vis the interest that legislatively prevailed over it.[94] And that, I believe—the predictable[95] early reaction to *Roe* notwithstanding ("more of the same Warren-type activism"[96])—is a charge that can responsibly be leveled at no other decision of the past twenty years.[97] At times the

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[88] Even if the case could be made that abortion is an issue that pits the interests of men against those of women, that alone would not bring it within a theory that renders suspect classifications based on generalizations about the characteristics of men and women. And even if there were some way to expand the theory (and I confess I cannot see what judicial remedy would be appropriate were the theory so expanded, *but see* note 85 *supra*, third paragraph) to cover all "interests of men versus interests of women" situations, it will take some proving to establish that this is one:

> [D]ecisions in society are made by those who have power and not by those who have rights. Husbands and boy friends may in the end wield the power and make the abortion decision. Many women may be forced to have abortions not because it is their right, but because they are forced by egocentric men to submit to this procedure to avoid an unwanted inconvenience to men.

Stone, *supra* note 22.

[89] It might be suggested that legislation restricting abortion had been kept on the books by the efforts of an intense minority and did not represent the will of most legislative majorities. Though I am aware of no basis for inferring this is any truer here than it is with respect to other sorts of legislation, *see also* note 86 *supra*, it is the sort of claim that is hard to disprove. (The phenomenon described at pp. 946-47 *infra*, one of relief that the issue has been taken out of the political arena, is a very different matter.) In any event it is not the Court's job to repeal such legislation. In the first place there is nothing unusual, and I was not aware there was anything wrong, with an intense minority's compromising on issues about which it feels less strongly in order to garner support on those it cares most about. Moreover, precisely because the claims involved are difficult to evaluate, I would not want to entrust to the judiciary authority to guess about them—certainly not under the guise of enforcing the Constitution. Leaving aside the arguable case of a law that has been neither legislatively considered *nor enforced* for decades, *see* A. BICKEL, THE LEAST DANGEROUS BRANCH 143-56 (1962), the Court should rest its declaration of unconstitutionality, if any, on more than a guess about how widespread and intense the support for the law "really" is.

[90] The claimed connection is often empirical, causal or normative. About all that does *not* seem to become involved is formal logic. *See* p. 941 *infra;* Ely, *supra* note 28, at 1237-49.

[91] Even this statement of the demands of "substantive due process" is too strong for many Justices and commentators, who deny that any such doctrine should exist. *See, e.g.*, pp. 937-38 *infra*.

[92] *See* Branzburg v. Hayes, 408 U.S. 665 (1972).

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[93] *See* pp. 928-33 *supra*. Necessarily, a claim of this sort can never be established beyond doubt; one can only proceed by examining the claims of those values he thinks, or others have suggested, are traceable to the Constitution. It is always possible, however, that someone will develop a general theory of entitlements that encompasses a given case and plausibly demonstrate its constitutional connections. It is also possible that had the constitutional right to an abortion been developed as constitutional doctrines usually are—that is incrementally, rather than by the quantum jump of *Roe*—the connection of the first step with the Constitution, and that of each succeeding step with its predecessor, would have seemed more plausible. I cannot bring myself to believe, however, that any amount of gradualism could serve to make anything approaching the entire inference convincing.

[94] The thing about permitting disparity among state laws regulating abortion that *I* find most troubling is not mentioned by the Court, and that is that some people can afford the fare to a neighboring state and others cannot. Of course this situation prevails with respect to divorce and a host of other sorts of laws as well. I wish someone could develop a theory that would enable the Court to take account of this concern without implying a complete obliteration of the federal system that is so obviously at the heart of the Constitution's plan. I have not been able to do so. *See* note 87 *supra*.

[95] *See* pp. 943-45 *infra*.

[96] *See, e.g., Abortion*, THE NEW REPUBLIC, Feb. 10, 1973, at 9; Stone, *supra* note 22.

[97] Of course one can disagree with the lengths to which the inferences have been taken; my point is that the prior decisions, including those that have drawn the most fire, at least started from a value singled out by, or fairly inferable from, the Constitution as entitled to special protection. Whatever one may think of the code of conduct laid down in Miranda v. Arizona, 384 U.S. 436 (1966), the Constitution does talk about the right to counsel and the privilege against self-incrimination. Whatever one may think of the strictness of the scrutiny exercised in Furman v. Georgia, 408 U.S. 238 (1972), the Eighth Amendment surely does indicate in a general way that punishments are to be scrutinized for erratic imposition ("unusual") and severity disproportionate to any good they can be expected to accomplish ("cruel").

Note that the claim in the text has to do with the capacity of the earlier decisions to be *rationalized* in terms of some value highlighted by the Constitution, not with the skill with which they were in fact rendered. It is now pretty generally recognized, for example, that the various "wealth discrimination" cases could better have been defended in terms of the constitutional attention paid explicitly or implicitly to the "goods" whose distribution was in issue—the right to vote and the assurance of fair judicial procedures. *See, e.g.*, Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Reynolds v. Sims, 377 U.S. 533 (1964), is a badly articulated opinion. Its only response to the argument made by Justice Stewart—that since an equal protection claim was involved, a rational defense of a disparity among the "weights" of votes should suffice—was simply to announce that the goals Justice Stewart had in mind were off limits. *See* Ely, *supra* note 28, at 1226-27. But even Justice Stewart could not take the equal protection mold too seriously, for he added he would not approve a plan that permitted "the systematic frustration of the will of a majority of the electorate of the State." Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 753-54 (1964) (footnote omitted). Such a plan, however, could be quite "rational" in terms of the sort of goals Justice Stewart had in mind, goals that in other contexts would count as legitimate. Obviously Justice Stewart was moved to some extent by the notion that a system whereby a minority could perpetuate its control of the government was out of accord with the system of government envisioned by the framers. *See also* Kramer v. Union Free School District No. 15, 395 U.S. 621, 628 (1969) (Warren, C.J., for the Court). This was what moved the Court too, though much further. And though the Court did inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.

IV

Not in the last thirty-five years at any rate. For, as the received learning has it, this sort of thing did happen before, repeatedly. From its 1905 decision in *Lochner v. New York*[98] into the 1930's the Court, frequently though not always under the rubric of "liberty of contract," employed the Due Process Clauses of the Fourteenth and Fifth Amendments to invalidate a good deal of legislation. According to the dissenters at the time and virtually all the commentators since, the Court had simply manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures. So indeed the Court itself came to see the matter, and its reaction was complete:

> There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner v. New York,* 198 U.S. 45 (1905), outlawing

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not give the reason, there is one: a fear that by attempting to apply Justice Stewart's "in between" standard it would become embroiled in unseemly "political" inquiries into the power alignments prevalent in the various states. *See* Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science,* 20 STAN. L. REV. 169, 246-47 (1968); *cf.* note 89 *supra; but cf.* Mahan v. Howell, 41 U.S.L.W. 4277 (U.S. Feb. 20, 1973). Though the point is surely debatable, the impulse is understandable, and the fight in *Reynolds,* like that in *Miranda,* turns out to be not so much over the underlying values as over the need for a "clean" prophylactic rule that will keep the courts out of messy factual disputes.

In his concurrence in *Roe,* Justice Stewart lists ten cases to prove that "the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights." 93 S. Ct. at 734. His point is obviously that the freedoms involved were given protection above and beyond the ordinary demand for a "rational" defense and therefore *Roe* is just more of the same. It is not. Schware v. Bd. of Bar Examiners, 353 U.S. 232 (1957); Aptheker v. Secretary of State, 378 U.S. 500 (1964); and Kent v. Dulles, 357 U.S. 116 (1958), are all obviously rationalizable as First Amendment cases and indeed have since been so rationalized. Concerning *Schware,* see Griswold v. Connecticut, 381 U.S. 479, 483 (1965); *cf.* United States v. Brown, 381 U.S. 437, 456 (1965). As to *Aptheker* and *Kent,* see Zemel v. Rusk, 381 U.S. 1, 16 (1965); United States v. Brown, 381 U.S. at 456. Concerning Pierce v. Society of Sisters and Meyer v. Nebraska, see note 79 *supra.* As to Shapiro v. Thompson, 394 U.S. 618 (1969), and United States v. Guest, 383 U.S. 745 (1966), see p. 927 *supra.* With respect to Carrington v. Rash, 380 U.S. 89 (1965), see the preceding paragraph of this footnote and C. BLACK, *supra* note 56. Concerning Bolling v. Sharpe, 347 U.S. 497 (1954), see note 79 *supra; but cf.* Linde, *Judges, Critics, and the Realist Tradition,* 82 YALE L.J. 227, 233-35 (1972). And *compare* Truax v. Raich, 239 U.S. 33 (1915), *with* Graham v. Richardson, 403 U.S. 365 (1971), *and* note 85 *supra.*

[98] 198 U.S. 45 (1905).

> "yellow dog" contracts, *Coppage v. Kansas,* 236 U.S. 1 (1915), setting minimum wages for women, *Adkins v. Children's Hospital,* 261 U.S. 525 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co. v. Bryan,* 264 U.S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time . . . . Mr. Justice Holmes said,
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>> "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."
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> . . . The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.[99]

It may be objected that *Lochner et al.* protected the "economic rights" of businessmen whereas *Roe* protects a "human right." It should be noted, however, that not all of the *Lochner* series involved economic regulation;[100] that even those that did resist the "big business" stereotype with which the commentators tend to associate them; and that in some of them the employer's "liberty of contract" claim was joined by the employee, who knew that if he had to be employed on the terms set by the law in question, he could not be employed at all.[101] This is a predicament that is economic to be sure, but is not without its "human" dimension. Similarly "human" seems the predicament of the appellees in the 1970 case of *Dandridge v. Williams,*[102] who challenged the Maryland Welfare Department's practice of limiting AFDC grants to $250 regardless of family size or need. Yet in language that remains among its favored points of reference,[103] the

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[99] Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963) (footnotes omitted). *See also* Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 533-37 (1949).

[100] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[101] *E.g.,* Adkins v. Children's Hospital, 261 U.S. 525, 542-43 (1923). *See also* Adair v. United States, 208 U.S. 161, 172-73 (1908). *Cf.* Hammer v. Dagenhart, 247 U.S. 251 (1918).

[102] 397 U.S. 471 (1970).

[103] *See, e.g.,* San Antonio Independent School Dist. v. Rodriguez, 41 U.S.L.W. 4407, 4417 (U.S. March 21, 1973); Ortwein v. Schwab, 41 U.S.L.W. 3473, 3474 (U.S. March 5, 1973); United States v. Kras, 93 S. Ct. 631, 638 (1973).

Court, speaking through Justice Stewart,[104] dismissed the complaint as "social and economic" and therefore essentially Lochneresque.

> [W]e deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights. . . . For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." . . . That era long ago passed into history. . . .
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> To be sure, the cases cited . . . have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. . . . It is a standard . . . that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of wise economic or social policy.[105]

It may be, however—at least it is not the sort of claim one can disprove —that the "right to an abortion," or noneconomic rights generally, accord more closely with "this generation's idealization of America"[106] than the "rights" asserted in either *Lochner* or *Dandridge*. But that attitude, of course, is *precisely* the point of the *Lochner* philosophy, which would grant unusual protection to those "rights" that somehow *seem* most pressing, regardless of whether the Constitution suggests any special solicitude for them. The Constitution has little to say about contract,[107] less about abortion, and those who would speculate about which the framers would have been more likely to protect may not be pleased with the answer. The Court continues to disavow the philosophy of *Lochner*.[108] Yet as Justice Stewart's concurrence admits, it is impossible candidly to regard *Roe* as the product of anything else.[109]

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[104] *But cf.* note 109 *infra*.

[105] 397 U.S. at 484-86.

[106] Karst & Horowitz, Reitman v. Mulkey: *A Teleophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 57-58; *cf.* 2 L. POLLAK, THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY 266-67 (1966).

[107] *But see* U.S. CONST. art. I, § 10; Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

[108] *See* note 103 *supra*.

[109] 93 S. Ct. at 734. The only "*Lochner* era" cases Justice Stewart cites are *Meyer* and *Pierce*. It therefore may be he intends to pursue some sort of "economic-noneconomic" line in selecting rights entitled to special protection. *But see* text at note 105 *supra*. The general philosophy of constitutional adjudication, however, is the same. *See* text at notes 106-07 *supra*. Justice Stewart rather clearly intends his *Roe* opinion as a repudiation

That alone should be enough to damn it. Criticism of the *Lochner* philosophy has been virtually universal and will not be rehearsed here. I would, however, like to suggest briefly that although *Lochner* and *Roe* are twins to be sure, they are not identical. While I would hesitate to argue that one is more defensible than the other in terms of judicial style, there *are* differences in that regard that suggest *Roe* may turn out to be the more dangerous precedent.

All the "superimposition of the Court's own value choices" talk is, of course, the characterization of others and not the language of *Lochner* or its progeny. Indeed, those cases did not argue that "liberty of contract" was a preferred constitutional freedom, but rather represented it as merely one among the numerous aspects of "liberty" the Fourteenth Amendment protects, therefore requiring of its inhibitors a "rational" defense.

> In our opinion that section . . . is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor; each right, however, being subject to the fundamental condition that no contract, whatever its subject matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good.[110]

> Undoubtedly, the police power of the State may be exerted to protect purchasers from imposition by sale of short weight loaves. . . . Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted.[111]

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of his *Griswold* dissent, and not simply as an acquiescence in what the Court did in the earlier case. *See* 93 S. Ct. at 735.

Having established to his present satisfaction that the Due Process Clause extends unusual substantive protection to interests the Constitution nowhere marks as special, *but see* note 97 *supra,* he provides no further assistance respecting the difficult questions before the Court, but rather defers to the Court's "thorough demonstration" that the interests in protecting the mother and preserving the fetus cannot support the legislation involved. *But see* pp. 922-26 *supra*.

[110] Adair v. United States, 208 U.S. 161, 172 (1908). *See also id*. at 174.

[111] Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924). *See also id*. at 517; Meyer v. Nebraska, 262 U.S. 390, 399-400, 403 (1923); Adkins v. Children's Hospital, 261 U.S. 525, 529 (1923); Coppage v. Kansas, 236 U.S. 1, 14 (1915); Lochner v. New York, 198 U.S. 45, 53, 54, 56, 57 (1905); *id*. at 68 (Harlan, J., dissenting).

Thus the test *Lochner* and its progeny purported to apply is that which would theoretically control the same questions today: whether a plausible argument can be made that the legislative action furthers some permissible governmental goal.[112] The trouble, of course, is they misapplied it. *Roe,* on the other hand, is quite explicit that the right to an abortion is a "fundamental" one, requiring not merely a "rational" defense for its inhibition but rather a "compelling" one.

A second difference between *Lochner et al.* and *Roe* has to do with the nature of the legislative judgments being second-guessed. In the main, the "refutations" tendered by the *Lochner* series were of two sorts. The first took the form of declarations that the goals in terms of which the legislatures' actions were defended were impermissible. Thus, for example, the equalization of unequal bargaining power and the strengthening of the labor movement are simply ends the legislature had no business pursuing, and consequently its actions cannot thereby be justified.[113] The second form of "refutation" took the form not of denying the legitimacy of the goal relied on but rather of denying the plausibility of the legislature's empirical judgment that its action would *promote* that goal.

> In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman.[114]

> There is no evidence in support of the thought that purchasers have been or are likely to be induced to take a nine and a half or a ten ounce loaf for a pound (16 ounce) loaf, or an eighteen and a half or a 19 ounce loaf for a pound and a half (24 ounce) loaf; and it is contrary to common experience and unreasonable to assume that there could be any danger of such deception.[115]

The *Roe* opinion's "refutation" of the legislative judgment that anti-abortion statutes can be justified in terms of the protection of the fetus takes neither of these forms. The Court grants that protecting the fetus is an "important and legitimate" governmental goal,[116] and of course it does not deny that restricting abortion promotes it.[117] What it does, instead, is simply announce that that goal is not important enough to sustain the restriction. There is little doubt that judgments of this sort were involved in *Lochner et al.*,[118] but what the Court *said* in those cases was not that the legislature had incorrectly balanced two legitimate but competing goals, but rather that the goal it had favored was impermissible or the legislation involved did not really promote it.[119]

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[112] *But cf.* note 91 *supra.*

[113] Coppage v. Kansas, 236 U.S. 1, 16-17, 17-18 (1915). *See also* Meyer v. Nebraska, 262 U.S. 390, 403 (1923); Adair v. United States, 208 U.S. 161, 174-75 (1908); Lochner v. New York, 198 U.S. 45, 57-58 (1905).

[114] Lochner v. New York, 198 U.S. 45, 62 (1905). *See also id.* at 57, 58, 59, 64.

[115] Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 517 (1924). *See also* Coppage v. Kansas, 236 U.S. 1, 15-16 (1915).

[116] Note 8 *supra.*

Perhaps this is merely a rhetorical difference, but it could prove to be important. *Lochner et al.* were thoroughly disreputable decisions; but at least they did us the favor of sowing the seeds of their own destruction. To say that the equalization of bargaining power or the fostering of the labor movement is a goal outside the ambit of a "police power" broad enough to forbid all contracts the state legislature can reasonably regard "as inconsistent with the public interests or as hurtful to the public order or as detrimental to the common good"[120] is to say something that is, in a word, wrong.[121] And it is just as obviously wrong to declare, for example, that restrictions on long working hours cannot reasonably be said to promote health and safety.[122] *Roe*'s "refutation" of the legislative judgment, on the other, is *not* obviously wrong, for the substitution of one nonrational judgment for another concerning the relative importance of a mother's opportunity to live the life she has planned and a fetus's opportunity to live at all, can be labeled neither wrong nor right. The problem with *Roe* is not so much that it bungles the question it sets itself,[123] but rather that it sets itself a question the Constitution has not made the Court's business. It *looks* different from *Lochner*—it has the shape if not the substance of a judgment that is very much the Court's business, one vindicating an interest the Constitution marks as special—and it is for that reason perhaps more dangerous. Of course in a sense it is more candid than *Lochner*.[124] But the employment of a higher standard of judicial review, no matter how candid the recognition that it is indeed higher, loses some of its admirability when it is accompanied by neither a coherent account of why such a standard is appropriate nor any indication of why it has not been satisfied.

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[117] The *Lochner* approach to factual claims is, however, suggested by the Court's ready acceptance—by way of nullifying the state's health interest during the first trimester—of the data adduced by appellants and certain *amici* to the effect that abortions performed during the first trimester are safer than childbirth. 93 S. Ct. at 725. This is not in fact agreed to by all doctors—the data are of course severely limited—and the Court's view of the matter is plainly not the only one that is "rational" under the usual standards. *See* San Antonio Independent School Dist. v. Rodriguez, 41 U.S.L.W. 4407, 4420 (U.S. March 21, 1973); Eisenstadt v. Baird, 405 U.S. 438, 470 (1972) (Burger, C.J., dissenting):

> The actual hazards of introducing a particular foreign substance into the human body are frequently controverted, and I cannot believe the unanimity of expert opinion is a prerequisite to a State's exercise of its police power, no matter what the subject matter of the regulation. Even assuming no present dispute among medical authorities, we cannot ignore that it has become commonplace for a drug or food additive to be universally regarded as harmless on one day and to be condemned as perilous the next. It is inappropriate for this Court to overrule a legislative classification by relying on the present consensus among leading authorities. The commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion.

I suppose the Court's defense of its unusual reaction to the scientific data would be that the case is unusual, in that it involves a "fundamental" interest. It should be noted, however, that even a sure sense that abortion during the first trimester is safer than childbirth would serve only to blunt a state's claim that it is, for reasons relating to maternal health, entitled to *proscribe* abortion; it would not support the inference the Court draws, that *regulations designed to make the abortion procedure safer* during the first trimester are impermissible. *See* 93 S. Ct. at 732.

[118] *Cf.* Meyer v. Nebraska, 262 U.S. 390 (1923); Adkins v. Children's Hospital, 261 U.S. 525, 546 (1923), Lochner v. New York, 198 U.S. 45, 53-54, 57 (1905).

[119] And even those cases that interlaced such claims with indications of a balancing test, *see* note 118 *supra*, sowed the seeds of their own reversal. *See* text at notes 120-21 *infra*. A claim that X weighs more than Y will have little persuasive or precedential value if it is bracketed with an indefensible assertion that Y is nothing.

[120] Adair v. United States, 208 U.S. 161, 172 (1908), quoted more fully at p. 932 *supra*. *See also, e.g.*, Lochner v. New York, 198 U.S. 45, 54 (1905).

[121] Wrong, that is, if one assigns to the words anything resembling their ordinary meanings. *See, e.g.*, Daniel v. Family Insurance Co., 336 U.S. 220, 224 (1949). One can of course argue that states should also have governments of few and defined powers, that they should not be vested with broad authority to go after whatever they regard as evils. But the Federal Constitution imposes no such restraint, and according to the test accepted even at the time of *Lochner* such authority, at least as a matter of federal constitutional law, does exist.

V

I do wish "Wolf!" hadn't been cried so often. When I suggest to my students that *Roe* lacks even colorable support in the constitutional text, history, or any other appropriate source of constitutional doctrine, they tell me they've heard all that before. When I point out they haven't heard it before from *me,* I can't really blame them for smiling.

But at least crying "Wolf!" doesn't influence the wolves; crying "Lochner!" may. Of course the Warren Court was aggressive in enforcing its ideals of liberty and equality. *But by and large, it attempted to defend its decisions in terms of inferences from values the Constitution marks as special.*[125] Its inferences were often controversial, but just as often our profession's prominent criticism deigned not to address them on their terms and contented itself with assertions that the Court was indulging in sheer acts of will, ramming its personal preferences down the country's throat—that it was, in a word, Lochnering. One possible judicial response to this style of criticism would be to conclude that one might as well be hanged for a sheep as a goat: So long as you're going to be told, no matter what you say, that all you do is Lochner, you might as well Lochner. Another, perhaps more likely in a new appointee, might be to reason that since Lochnering has so long been standard procedure, "just one more" (in a good cause, of course) can hardly matter. Actual reactions, of course, are not likely to be this self-conscious, but the critical style of offhand dismissal may have taken its toll nonetheless.

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[122] It is possible, of course, that I am here time-bound, and that the wrongness of *Lochner et al.* is obvious only because a half century of commentary has made it so. While I cannot rebut this, I am inclined to doubt it. In those decisions the Court stated the applicable tests in language much the same as would be used today—language the dissents cogently demonstrated could not be reconciled with the results. That views with which one disagrees can be reasonable nonetheless was a concept hardly new to lawyers even in 1900.

[123] *But compare* 93 S. Ct. at 732 *with* Doe v. Bolton, 93 S. Ct. 739 (1973). *See also* pp. 922-26 *supra.*

[124] With respect to the Equal Protection Clause, by way of contrast, the Court has taken to claiming it is simply applying the traditional rationality standard, whether it is or not. For a more optimistic view of the development, *see* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

[125] *See* note 97 *supra.* The "footnote 4" argument suggested in note 85 *supra* responds not so much to any clear constitutional concern with equality for women (*but*

Of course the Court has been aware that criticism of much that it has done has been widespread in academic as well as popular circles. But when it looks to the past decade's most prominent academic criticism, it will often find little there to distinguish it from the popular. Disagreements with the chain of inference by which the Court got from the Constitution to its result, if mentioned at all, have tended to be announced in the most conclusory terms, and the impression has often been left that the real quarrel of the Academy, like that of the laity, is with the results the Court has been reaching and perhaps with judicial "activism" in general.[126] Naturally the Court is sensitive to criticism of this sort, but these are issues on which it will, when push comes to shove, trust its own judgment. (And it has no reason not to: Law professors do not agree on what results are "good," and even if they did, there is no reason to assume their judgment is any better on *that* issue than the Court's.) And academic criticism of the sort that might (because it should) have some effect—criticism suggesting misperceptions in the Court's reading of the value structure set forth in the document from which it derives its authority, or unjustifiable inferences it has drawn from that value structure—has seemed

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see U.S. CONST. amend. XIX) as to the unavoidable obligation to give "principled" content to the facially inscrutable Equal Protection Clause. *See* pp. 948-49 *infra*. Virtually everyone agrees that classifications by race were intended to be and should be tested by a higher than usual standard, and that at least some others—though the nature and length of the list are seriously disputed—are sufficiently "racelike" to merit comparable treatment. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971). The problem thus becomes one of identifying those features of racial classifications that validly compel the deviation from the usual standard, and in turn those classifications that share those features.

[126] *See, e.g.*, Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government*, 78 HARV. L. REV. 143, 144-45, 149, 163, 175 (1964).

for a time somehow out of fashion, the voguish course being simply to dismiss the process by which a disfavored result was reached as Lochnering pure and simple. But if the critics cannot trouble themselves with such details, it is difficult to expect the Court to worry much about them either.

This tendency of commentators to substitute snappy dismissal for careful evaluation of the Court's constitutional inferences—and of course it is simply a tendency, never universally shared and hopefully on the wane—may include among its causes simple laziness, boredom and a natural reluctance to get out of step with the high-steppers. But in part it has also reflected a considered rejection of the view of constitutional adjudication from which my remarks have proceeded. There is a powerful body of opinion that would dismiss the call for substantive criticism—and its underlying assumption that some constitutional inferences are responsible while others are not—as naive. For, the theory goes, except as to the most trivial and least controversial questions (such as the length of a Senator's term), the Constitution speaks in the vaguest and most general terms;[127] the most its clauses can provide are "more or less suitable pegs on which judicial policy choices are hung."[128] Thus anyone who suggests the Constitution can provide significant guidance for today's difficult questions either deludes himself or seeks to delude the Court. Essentially all the Court *can* do is honor the value preferences it sees fit, and it should be graded according to the judgment and skill with which it does so.[129]

One version of this view appears to be held by President Nixon. It is true that in announcing the appointment of Justices Powell and Rehnquist, he described a "judicial conservative"—his kind of Justice—as one who does not "twist or bend the Constitution in order to perpetuate his personal political and social views."[130] But the example he then gave bore witness that he was not so "naive" after all.

> As a judicial conservative, I believe some court decisions have gone too far in the past in weakening the peace forces as against the criminal forces in our society. . . . [T]he peace forces must

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[127] *See, e.g.*, A. Bickel, *supra* note 89, at 84-92; A. Bickel, The Supreme Court and the Idea of Progress 177 (1970); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 Calif. L. Rev. 821 (1962).

[128] Linde, *supra* note 97, at 254.

[129]
> The Court will continue to play the role of the omniscient and strive toward omnipotence. And the law reviews will continue to play the game of evaluating the Court's work in light of the fictions of the law, legal reasoning, and legal history rather than deal with the realities of politics and statesmanship.

Kurland, *supra* note 126, at 175.

[130] 7 Weekly Comp. of Presidential Documents 1431 (Oct. 25, 1971).

> not be denied the legal tools they need to protect the innocent from criminal elements.[131]

That this sort of invitation, to get in there and Lochner for the right goals, can contribute to opinions like *Roe* is obvious. In terms of process, it is just what the President ordered.

The academic version of this general view is considerably more subtle. It agrees that the Court will find little help in the Constitution and therefore has no real choice other than to decide for itself which value preferences to honor, but denies that it should necessarily opt for the preferences favored by the Justices themselves or the President who appointed them. To the extent "progress" is to concern the Justices at all, it should be defined not in terms of what they would like it to be but rather in terms of their best estimate of what over time the American people will make it[132]—that is, they should seek "durable" decisions.[133] This, however, is no easy task, and the goals that receive practically all the critics' attention, and presumably are supposed to receive practically all the Court's, are its own institutional survival and effectiveness.[134]

Whatever the other merits or demerits of this sort of criticism, it plainly is not what it is meant to be—an effective argument for judicial self-restraint. For a Governor Warren or a Senator Black will rightly see no reason to defer to law professors on the probable direction of progress; even less do they need the Academy's advice on what is politically feasible; and they know that despite the Court's history of frequent immersion in hot water,[135] its "institutional position" has been getting stronger for 200 years.

Roe is a case in point. Certainly, many will view it as social progress. (Surely that is the Court's view, and indeed the legislatures had been moving perceptibly, albeit too slowly for many of us, toward relaxing their anti-abortion legislation.)[136] And it is difficult to see how it will weaken the Court's position. Fears of official disobedience are obviously groundless when it is a criminal statute that has been invalidated.[137] To the public the *Roe* decision must look very much like the New York Legislature's recent liberalization of its abortion law.[138] Even in the unlikely event someone should catch the public's ear long enough to charge that the wrong institution did the repealing, they have heard that "legalism" before without taking to the streets. Nor are the political branches, and this of course is what really counts, likely to take up the cry very strenuously: The sighs of relief as this particular albatross was cut from the legislative and executive necks seemed to me audible. Perhaps I heard wrong—I live in the Northeast, indeed not so very far from Hyannis Port. It is even possible that a constitutional amendment will emerge, though that too has happened before without serious impairment of the Position of the Institution. But I doubt one will: *Roe v. Wade* seems like a durable decision.

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[131] *Id* at 1432.

[132] *See generally* A. Bickel, The Supreme Court and the Idea of Progress (1970). Professor Bickel's thought is of course much richer than it is here reported. But the catchier aspects of a person's work have a tendency to develop a life of their own and on occasion to function, particularly in the thinking of others and perhaps to an extent even in the author's own, without the background against which they were originally presented. *Cf.* note 138 *infra.*

[133] *See* Hart, *Foreword: The Time Chart of the Justices,* 73 Harv. L. Rev. 84, 99 (1959). *See also* A. Bickel, *supra* note 127, at 99; Kurland, *Earl Warren, the "Warren Court," and the Warren Myths,* 67 Mich. L. Rev. 353, 357 (1968). *Cf.* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law—Due-Process" Formula,* 16 U.C.L.A.L. Rev. 716, 746-48 (1969); Karst & Horowitz, *supra* note 106, at 79.

[134] *E.g.,* A. Bickel, *supra* note 127, at 95; Kurland, *Toward a Political Supreme Court,* 32 U. Chi. L. Rev. 19, 20, 22 (1969).

[135] *See generally* W. Murphy, Congress and the Court (1962); C. Warren, The Supreme Court in United States History (rev. ed. 1932).

It is, nevertheless, a very bad decision. Not because it will perceptibly weaken the Court—it won't; and not because it conflicts with either my idea of progress[139] or what the evidence suggests is society's[140]—it doesn't. It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.[141]

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[136] In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code . . . .

93 S. Ct. at 720.

By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Hawaii Rev. Stat. § 453-16 (Supp. 1971); N.Y. Penal Code § 125.05 (McKinney Supp. 1972-1973); Wash. Rev. Code §§ 9.02.060 to 9.02.080 (Supp. 1972) . . . .

Id. at 720 n.37.

[137] As opposed to the invalidation of a police practice. *Cf.* Miranda v. Arizona, 384 U.S. 436 (1966). *See also, e.g.,* Engel v. Vitale, 370 U.S. 421 (1962).

[138] Even the headline in *The New York Times* announced: "High Court Rules Abortions Legal [sic] the First 3 Months." N.Y. Times, January 23, 1973, p. 1, cols. 1-8.

[139] *See* pp. 926-27 *supra.* Of course there are some possible uses of the decision that scare me, particularly when it is considered in conjunction (a) with some of this Court's motions relating to a mother's "waiver" of AFDC assistance, *see* Wyman v. James, 400 U.S. 309 (1971), and (b) with Buck v. Bell, 274 U.S. 200 (1927), which was indeed relied on by the Court in *Roe,* 93 S. Ct. at 727, and cited without apparent disapproval in Justice Douglas's concurrence, *id.* at 759. But those are quite different cases I'm conjuring up.

[140] *See* note 136 *supra. But cf. Abortion,* THE NEW REPUBLIC, Feb. 10, 1973, at 9:

[I]f the Court's guess concerning the probable and desirable direction of progress is wrong, it will nevertheless have been imposed on all 50 states, and imposed permanently, unless the Court itself should in the future change its mind. Normal legislation, enacted by legislatures rather than judges, is happily not so rigid, and not so presumptuous in its claims to universality and permanence.

[141] In judicial review, the line between the "juridical" and the "legislative" mode does not run between "strict constructionists" and competing theorists of constitu-

I am aware the Court cannot simply "lay the Article of the Constitution which is invoked beside the statute which is challenged and . . . decide whether the latter squares with the former."[142] That is precisely the reason commentators are needed.

> [P]recisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State, the basis of judgment as to the Constitutionality of state action must be a rational one, approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government.[143]

> No matter how imprecise in application to specific modern fact situations, the constitutional guarantees do provide a direction, a goal, an ideal citizen-government relationship. They rule out many alternative directions, goals, and ideals.[144]

And they fail to support the ruling out of others.

Of course that only begins the inquiry. Identification and definition of the values with which the Constitution is concerned will often fall short of indicating with anything resembling clarity the deference to be given those values when they conflict with others society finds important. (Though even here the process is sometimes more helpful than the commentators would allow.) Nor is it often likely to generate, fullblown, the "neutral" principle that will avoid embarrassment in future cases.[145] But though the identification of a constitutional connection is only the beginning of analysis, it is a necessary beginning. The point that often gets lost in the commentary, and obviously got

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> tional interpretation. Rather, it divides constructionists and non-constructionists, those who do and those who do not see judicial review as a task of construing the living meaning of past political decisions—a division in which the alternating libertarianism and conservatism of the late Justices Black and Harlan were on the same side.

Linde, *supra* note 97, at 254-55 (footnote omitted).

[142] United States v. Butler, 297 U.S. 1, 62 (1936).

[143] Poe v. Ullman, 367 U.S. 497, 539-40 (1961) (Harlan, J., dissenting).

[144] Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court,* 84 HARV. L. REV. 769, 785 (1971) (footnote omitted).

[145] *See generally* Ely, *supra* note 28.

> Starting from a clearly unconstitutional course of action—and I have trouble seeing the unconstitutionality of a tax exemption for only Caucasian children as a controversial assumption—and attempting to explain why it is unconstitutional in terms of a theory capable of acceptable and consistent application to other areas, is a perfectly sensible way of developing constitutional doctrine.

Id. at 1262. I might have made (even more) explicit that the action around which the search for the "principled" approach is to be centered should be one—and, to paraphrase myself, I have trouble seeing the example I chose as controversial in this regard—whose impermissibility is established by values traceable to the Constitution.

lost in *Roe,* is that *before* the Court can get to the "balancing" stage, *before* it can worry about the next case and the case after that (or even about its institutional position) it is under an obligation to trace its premises to the charter from which it derives its authority. A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.[146] I hope that will seem obvious to the point of banality. Yet those of us to whom it does seem obvious have seldom troubled to say so.[147] And because we have not, we must share in the blame for this decision.

146. *But see, e.g.,* Hart, *supra* note 133, at 99, *quoted* in part in Bickel, *Foreword: The Passive Virtues,* 75 HARV. L. REV. 40, 41 (1961):

> [T]he Court is predestined . . . to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles . . . .

But discerning constitutional principles afresh is one thing; developing them, no matter how neutral and durable, is quite another. An institution charged with looking after a set of values the rest of us have entrusted to it is significantly different from one with authority to amend the set.

147. *But see, e.g.,* Linde, *supra* note 97. *Cf.* Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 6-11 (1971), espousing the general view of constitutional adjudication espoused here, but characterizing *Griswold* as a typical Warren Court product, *id.* at 7, in order to buttress the more general claim—equally unfair in my view—that one cannot accept that general view and at the same time generally approve the work of that Court. *Id.* at 6. *See* Griswold v. Connecticut, 381 U.S. 479, 527 n.23 (1965) (Black, J., dissenting).

Philosophy:

MORALITY AND THE LAW

Should legal restraints on gambling, prostitution, pornography, and other traditional vices be eased? American voters and legislators seem increasingly disposed to answer "yes." Since the early 1960s, "You can't legislate morality" has become a cliché in public discussion of such matters. Political scientist Hadley Arkes takes issue with this notion, arguing that one may justifiably legislate *nothing but* morality. Arkes reaffirms Aristotle's conception of the polity as a "moral association." Above all, he says, the law must be principled. Otherwise, we risk the "corruption of the people."

by Hadley Arkes

All about us today urban life is celebrated, but largely for the wrong reasons. When the city is valued, it is valued as a theater of diversity, the center of a cosmopolitan culture, the breeding ground of freedom and tolerance. It is a place of specialty, movement, and color, of services tailored to the rarest tastes.

But these virtues are the virtues of the marketplace, or of the city as "hotel." What is lost in this vision of the city is the sense of a people joined together in a perception of common ends; who base their common life on procedures they regard, by and large, as just; and who cultivate an understanding of justice and morals in one another through the things they hold up to the community with the force of law. What is lost, in a word, is the Aristotelian sense of the city as *polity*.

It may be rather unsettling, even to members of an older generation, to regard the city as a source of moral instruction.

This essay is drawn from The Philosopher in the City: The Moral Dimensions of Urban Politics *by Hadley Arkes. Copyright © 1981 by Princeton University Press. Reprinted by permission of Princeton University Press.*

But the discomfort with that notion in our own day is a measure of how far we have drifted from the original understanding of the connection between morals and law. There is a tendency in our public discourse to equate moral judgments with matters of religious belief, or to reduce them to questions of the most subjective personal taste.

This confusion has been reflected in many of the college students I have known during the past decade. It was important to them to insist, for example, that the war in Vietnam not be regarded merely as an enterprise plagued by poor management and bad luck but as a thoroughly *immoral* venture. Yet as these students came to consider many of the problems that arose in the city—problems of drugs, abortion, the censorship of literature and the arts—they became liberals in a rather old sense that they usually disdained. Their tendency then was to argue that the state of anyone's morals was not the business of the government—that morals were essentially matters of the most personal taste or the most subjective, private belief.

The curious thing about this understanding of morals was that it reduced the indictment of the Vietnam war to the level of the utterly trivial. To say that the Vietnam War was "immoral"

Courtesy of Stephen Longstreet

San Francisco during the Gold Rush. Gambling, Arkes writes, is a "traditional vice" but not a "categorical wrong." It cannot be distinguished from such legitimate ventures as investing in the stock market.

was to say, in effect, that it was simply not to one's taste, much as one might profess an aversion to cabbage or squid.

But moral propositions are distinguished sharply from statements of merely personal taste or private belief. They claim to speak, rather, about the things that are *universally* right or wrong, just or unjust, for others as well as oneself. When we say that it is "wrong" to "kill without justification," we do in fact imply that it is wrong, even if the assailant happens to enjoy what he is doing. In that sense, there was a recognition in the past that it was the logic of morals which made necessary the existence of law: When we recognize that any act stands in the class of a wrong, we can no longer leave it, with indifference, to the domain of personal taste or private choice. We are compelled to forbid that act generally; to forbid it, in other words, with the force of law.

This connection between morals and law has rarely been made with more clarity than by Abraham Lincoln in his celebrated debates in 1858 with Stephen Douglas. Douglas professed that he regarded slavery as wrong, but he preferred to leave it to popular majorities in the separate territories of the United States to decide whether slavery should be voted up or down. As Lincoln pointed out,

> When Judge Douglas says that whoever, or whatever community, wants slaves, they have a right to have them, he is perfectly logical if there is nothing wrong in the institution; but if you admit that it is wrong, he cannot logically say that anybody has a right to do a wrong.

Philosophers of law may have succeeded over the years in rendering this point obscure, but most people of ordinary intellect seem to recognize that it is the awareness of a "wrong" that usually precedes the insistence that "there ought to be a law." When we consider our laws on murder, theft, and assault, it is plain even to the most committed libertarians that the laws embody perspectives that are authentically moral. But moral judgments of one kind or another—large or small, valid or arguable—underlie almost every kind of law on the books, from

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copyrights and embezzlement to the regulation of insurance. If the law has a claim to bind everyone, it is only because it claims to rest on something more than the personal tastes or opinions of those who rule.

Libertarians will concede that the law may coincide, at different points, with moral understandings, but they will insist, nevertheless, that the law ought to be limited in its reach to the relief of *material* harms or injuries. This perspective has become, of course, part of the orthodoxy of modern liberal jurisprudence, but it can be preserved only by forgetting the strict meaning of "moral principles" and the connection between morals and law. For that reason, this perspective fails to account for the most significant parts of our current laws.

Race and Social Science

A notable case in point would be the law that forbids discrimination on the basis of race in restaurants, inns, and other places of "public accommodation." When American lawyers and jurists are asked to explain the ground on which that law is justified, their disposition has been to say that the end of the law is to protect blacks against the deprivation of material goods and services: in this case, the deprivation of food or lodging.

And yet it would be hard to demonstrate that black people would be deprived of food simply because they were turned away from a particular restaurant. We would never assume that the same injury was being threatened in the case of a man who was turned away from a restaurant because he was not wearing a necktie. We recognize that he might well have access to food in establishments nearby, and the same possibilities may also be present for blacks. In fact, in the case in which this issue was argued before the Supreme Court in 1965, Ollie's Barbecue in Birmingham, Alabama, had a take-out counter serving blacks, even though blacks were not permitted in the main dining room. We accept the exclusion of the man who is improperly dressed, but we do not accept the exclusion of blacks; and our reasons have nothing to do with the denial of food.

We are brought back here to the recognition that the root of "injury" is in the Latin *in jus:* literally, not according to right or justice. Many hurts may be inflicted by dentists and lovers and Offices of Admission, but unless they are animated by unjust ends, we would not say that an "injury" had been done. Before we can define an injury, then, we must understand the nature of the principle that marks an act as "wrong."

But lawyers and judges have deflected themselves from the task of articulating those principles that form the proper ground of law. They have sought instead to divine the material injury that defines the wrong of each case, even if that injury must remain rather speculative or tenuous. Instead of basing their decisions on real principles—on propositions that hold true categorically, as a matter of necessity—they take, as the foundation of their judgments, calculations or predictions about the likelihood of material harms. In this tendency, the courts have sought reinforcement in the findings of modern social science, as though these findings could supply the moral axioms or principles that are missing from their judgments.

But it is in the nature of social science that it can never be more than statistical and contingent. What social science "knows," at best, are averages and aggregates within "confidence intervals," bounded by circumstances that may be highly mutable. Even when correlations and probabilities run very high, there is a serious question as to whether they may ever supply a proper foundation in the law for ordering the conduct (or restricting the freedom) of any person in particular.

It could be shown, for example, on the basis of aggregate data, that single males in America are threatened with serious injuries by remaining single. They are 22 times more likely than married men to be committed to hospitals for mental disease; they have nearly double the mortality rate of married men. And yet no one would think of using these findings as the foundation of a law that would save single men from these injuries by assigning any one of them, in particular, to a bride. In instances of this kind, the law would have drifted far from those principles or categorical propositions that alone can supply its proper foundation.

What Are Vices?

Altogether, then, these requirements of law would be quite demanding. If they had been applied in a strict way over the years, many statutes that have been on our books would have been swept away, and among these would have been many of the laws that have regulated certain traditional "vices."

It is one of the ironies of our time that the domain of morals has been reduced, in our public discourse, to cover matters such as gambling, drinking, and prostitution. But these occupations represent only a truncated part of those moral concerns that are addressed through the law, and oddly enough they do not represent, in all cases, the kinds of problems that represent categorical wrongs. It is doubtful, for example, that gambling coud be

Women in a Parisian brothel (1894), by Toulouse-Lautrec. Experiments with licensed prostitution in 19th-century Europe were short lived.

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distinguished from many other legitimate ventures in risk-taking, whether in business or politics, and there is no ground on which it could be said that the taking of alcoholic drinks would be injurious or wrong in all cases, regardless of whether it was done in excess or moderation.

When it comes to matters like prostitution and pornography, I think the traditional perspective turns out to be justified: These occupations or entertainments cannot be regarded on the same plane of legitimacy as occupations like nursing, carpentry, or tailoring. But the nature of the argument that will be required here may be easier to understand once we have become clear on the point that the law does not require evidence of *material injuries before it becomes justified in acting*.

Once that point has been established, the question of "vices" is no longer framed in the terms defined by liberal jurisprudence. As with discrimination based on race, the question turns not on proof of material injuries but on our understanding of the grounds on which prostitution and pornography can be regarded, in principle, as wrong.*

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*I would refer the reader to Chapter 14 of *The Philosopher in the City*, where this question is taken up in detail.

With a proper consistency, our jurists have confronted such issues in the same way they have faced other serious moral questions in the law. Instead of defining the principled grounds of the offense, their inclination has been to define the crime through its ancillary effects or its outward manifestations. But unless the authorities are willing to face directly the grounds on which they regard prostitution as a wrong, the result tends to be a series of vacuous regulations.

The "Prime Minister of Sin"

In New York City, for example, the authorities have sought to deal with the bogus "massage parlors" that are brothels in disguise by requiring massage parlors to add swimming pools and squash courts (as though the presence of these facilities insured the legitimacy of the enterprise). Beyond that, they have required massage parlors to be 1,000 feet apart and no closer than 500 feet to churches and schools. But if the businesses in question had been law firms, no one would have thought it necessary to keep them distant from churches and schools. The measure becomes plausible only when it is assumed that there is something illegitimate about the enterprises themselves. But if one could explain the grounds of principle on which these establishments could be regarded as offensive, there would be no need for such legal charades in the first place.

As I have suggested, those grounds of principle would be very exacting. There are many projects inspired by the tenderest regard for the public good that are not founded on any categorical propositions, and that should not be invested with the force of law. A political community that takes itself seriously as a moral association need not be driven then to extend its reach until it governs almost everything. A government that understands the moral grounds on which its own authority rests may actually end up, in many cases, doing less rather than more.

As Aristotle understood it, the possibility for government and law arose from the capacity of human beings to reason over matters of right and wrong. For animals, government would have been useless, since they were cut off from the possibilities for moral teaching that were implicit in the law. But if men were higher than animals, they also stood lower than gods in the order of nature, and for that reason they required the restraint of the law. The same understanding that established the responsibility of the government to teach through the laws also counseled a certain moderation in the burdens that might be placed on creatures that were notably less than angels.

It was never assumed, in the traditional understanding, that the aim of the law was to eradicate all vice. What the law sought to do, with a proper modesty, was to contain vices within tolerable limits. This view of the matter was reflected, for example, in the statutes established in Florence in 1415:

> Desiring to eliminate a worse evil by means of a lesser one, the lord priors . . . [and their colleges] have decreed that . . . the priors . . . [and their colleges] may authorize the establishment of two public brothels in the city of Florence, in addition to the one which already exists: one in the quarter of S. Spirito and the other in the quarter of S. Croce. [They are to be located] in suitable places or in places where the exercise of such scandalous activity can best be concealed, for the honor of the city and of those who live in the neighborhood in which these prostitutes must stay to hire their bodies for lucre. . . .

The understanding that lay behind statutes of this kind may be set forth rather simply. It was thought, with considerable reason, that if certain vices were made fully legal, if all legal inhibitions were removed, those vices would expand far beyond their present dimensions. At the same time, it was anticipated that activities of a correlative nature would develop, as one form of vice feeds upon another. This growth of the illegal network is the most ironic feature in the experience of "legalization." It is the feature that rarely fails to surprise nowadays, for it cuts against the assumption that legalized vices breed their own form of ennui.

And yet there is a very straightforward explanation as to why, enduringly, things seem to turn out in this way. The case of gambling provides a clear example. As I have suggested, gambling would not meet the strict requirements of a categorical wrong, but the experience with gambling nevertheless illustrates the tendencies that come into play when the legal restraints are removed from activities that were previously constrained as "vices."

In the early 1970s, the State of New York legalized a system of offtrack betting (OTB) with the hope of gathering some revenue for itself while at the same time undercutting the illegal network in gambling. Soon after the system was underway, however, it was estimated that $6 continued to flow within the illegal network for every $1 that moved through the legal betting parlors. By January 1974, it was estimated that illegal gambling had increased by 62 percent in dollar volume since OTB went into effect, while the state's racetracks were down sharply.

The MORNING DRAM.

The GROG SHOP.

Courtesy of the American Temperance Soc.

The Drunkard's Progress, *1826. Should temperance mean abstinence?*

The reasons were not hard to fathom. When the state itself declared gambling to be legitimate—indeed, when it urged the public, through advertising, to go out and bet—the state swept aside the moral reservations that still made many people reluctant to gamble. If there was nothing wrong with gambling in principle, then it was only a matter of betting where the returns were highest. They were highest, of course, with the illegal bookmakers.

The logic that has been played out in the legalization of gambling has been present perennially in the efforts to legalize prostitution as well. In the gatherings of the urbane today, it is quite common to hear it said that the problem of prostitution ought to be solved by having brothels licensed by the state. As the price of legal acceptance, prostitution would be confined to its own zone within a city, and there would be a regular system of medical examination for the sake of protecting "consumers" from venereal disease. In some cases, the argument is made that prostitution ought to be "decriminalized" altogether.

One would hardly know from the current conversation that virtually all of these proposals had been tried at one time, by rather sophisticated people of an earlier generation, and that they were all eventually abandoned.

A century ago, Sheldon Amos wrote his classic survey on the *Prohibition, Regulation, and Licensing of Vice in England and Europe* (1877), and what he recorded was a general repeal throughout Europe of the laws that licensed and legitimized prostitution. Characteristic of the movement was the action of the municipal government of Zurich, Switzerland, which abolished its system of regulation in 1874 as an arrangement that was finally "irreconcilable with the idea of the State as a moral power." The officers of the municipal government spoke out of an understanding, informed by tradition, of what was truly meant by a "city." As they put it:

> Toleration [of prostitution] gives rise to a fatal confusion of ideas; men become accustomed to regard all that passes in houses thus protected as a permitted thing. . . . A moral confusion no less fatal is produced among the employees and agents employed in the "morals-police"; the fact of being in constant relations with the tenants of bad houses necessarily leads to a species of intimacy. Moreover, it is not possible that they should display much energy against unlicensed prostitution while they are occupied in favouring licensed prostitution. . . . To admit any sort of compromise with a trade fundamentally evil, to tolerate one description of houses of debauchery and make war upon others, is to enter upon the path of half-measures, compromises, and the equivocal partiality, fruitless of every good result. . . .

As Sheldon Amos observed, the state becomes corrupted when it makes itself the sponsor of vice; it would stand before its subjects as "the supreme monopolist and prime minister of sin." Or, as the saying has it in New York, the state would become "the biggest pimp of them all."

Those in our own time who rail against the "intrusion" of the law into questions of morality are adamant in other cases that the law must also render "justice." They are no more willing than anyone else to repeal laws that embody what even they would concede to be moral perspectives. They are unwilling to remove the statutes on the battering of wives and the selling of children. Many of them, as I have noted, would argue that most of these cases involve material harms; and yet without quite admitting it to themselves, they are willing enough to impose restraints through the law even when material harms are not present. They may insist on stopping men from "exposing themselves" to children. They may act in the name of "the environment" to pull down billboards or garish neon lights.

What, then, is the source of the conviction, so prevalent and clichéd in our own day, that one may not "legislate morality?" There is, of course, a rich tradition of moral relativism that may be drawn upon in a variety of forms, along with the admonition, ancient and trite, that a law that runs counter to popular habits may be difficult to enforce. But when people insist today that it is both wrong and futile to legislate morality, the example they cite most often is that of Prohibition, the movement that succeeded (for a while) in banning the manufacture and sale of alcoholic beverages.

Prohibition, it might be said, gave morals a bad name. It encouraged the tendency, even among the educated, to confuse *morals*—and the discipline of principled discourse—with a strident *moralism.* As I have already suggested, Prohibition represented a counterfeit morality: It condemned the drinking of liquor in any quantity, under any circumstances—it condemned drinking, in short, with the force of categorical judgment, even though it was plain that drinking could not meet the strict requirements of a categorical wrong.

Corruption of the People

Abraham Lincoln, who clearly sought moral ends in politics, preserved his own detachment from the so-called "temperance" movement of his time. The problem for Lincoln was that these crusaders did not seek temperance at all, in the classic sense of "moderation"; what they sought, rather, was abstinence. As Lincoln characterized the movement, it looked forward to the day when all appetites would be controlled, all passions subdued, all matters subjected, and "*mind*, all conquering *mind*, shall live and move the monarch of the world."

One danger with visions of this kind is that the mandates of perfection require a concentration of power that might be incompatible with the conditions of free government. The law has a responsibility to teach, but statesmen have an obligation to be prudent and reasonable. As Thomas Aquinas argued, the aim of the law is to lead people to virtue, not suddenly, but gradually. "Otherwise," he wrote, "these imperfect ones, being unable to bear such precepts, would break out into yet greater evils: thus, it is written (Prov. 33): *He that violently bloweth his nose, bringeth out blood.*"

But if we lean, in our teaching, toward prudence, if we leaven our laws with a sense of what can reasonably be expected, we do not imply in any way that morals are impracticable, or that the dominant concern of the law can be anything other than moral instruction. We are led to remind ourselves that the case for constitutional government has the same origins in principle as the case for republican government or government by consent: They both begin with the recognition that beings which are capable of reasoning over moral things do not deserve to be ruled in the way that one rules beings that are not capable of giving and understanding reasons. And if the case for lawful government begins with the capacity of human beings for moral judgement, the rulers must be invested with an obligation to do far more than seek their own interests and preserve the security of the citizens.

It has often been observed that, for Jefferson, the greatest threat to republican government came from the usurpations that the government itself might commit if the people lost their vigilance or their capacity for revolution. That understanding had, as far as it went, a certain truth, but it took Lincoln and the experience of another generation to make it more complete. As Professor Harry Jaffa has pointed out, Lincoln understood that "once the government was established upon a popular basis, the great danger was the corruption of the people" themselves. A corrupted people, who were willing to injure some of their members to serve the interests or the passions of the majority, would soon bring forward talented and ambitious men, who were more than content to ride to power by catering to those passions.

A government that drew its leaders from the people themselves could not afford to be indifferent to the moral condition of its citizens. It was the most serious corruption of understanding to say that this government—a republican government—should have less concern than any other with the moral improvement of its citizens. That is a persuasion that would be inconsistent at its root with the premises on which a free government rests, and it would render us incapable of addressing those questions of justice which must form, enduringly, our most urgent business.

The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law

By Steven Polgar and Ellen S. Fried

Although the incidence of illegal abortion in the United States has been vastly reduced since the Supreme Court's 1973 decisions overturning restrictive state abortion laws, some women continue to obtain—and die as the result of—clandestine abortions, self-induced or performed by nonmedical operators. What is more, virtually all of the women who have died from illegal abortions since the Supreme Court decisions have been poor and members of minority groups—80 percent of them were nonwhites.[1] A high-powered national campaign is under way to amend the Constitution and make abortion a criminal offense—turning the clock back to the days before liberalized abortion laws were passed in the late 1960s, and where it remains stopped for millions of women in countries where it is still impossible to obtain safe, legal abortions. Examination of the illegal abortion situation that obtained in New York City in the mid-1960s, before liberalization of New York's abortion law, is therefore illustrative of what might be expected if antiabortion groups win their battle to reverse the Supreme Court decisions; it is also suggestive of what is being experienced currently by women still denied access to safe, legal abortions because of poverty and restrictive local policies.[2]

In the 1960s, prior to liberalization of New York State's restrictive abortion law, an average of 400 legal ("therapeutic") abortions were performed each year. Poor and minority-group women were virtually precluded from obtaining safe, legal procedures, the overwhelming majority of which were obtained by White women in the private hospital services on psychiatric indications.[3] Most of the poor and minority-group women seeking to obtain abortions, it may be presumed, were among the 50,000 New York City women estimated to have obtained clandestine abortions annually in the preliberalization years.[4] Abortion-related mortality in those years was very high—about 25 deaths annually—all attributable to clandestine procedures.[5] By 1974, illegal abortion mortality had been wiped out—and there was only one death associated with legal abortion.[6] On the basis of survey data collected in the mid-1960s, we will describe in this article some of the facts about clandestine abortion before the law was changed.

This investigation is part of a project initiated in 1965 by the Planned Parenthood Federation of America in collaboration with its affiliates in New York City. Interviews were conducted in 1965 and 1967 by the New York office of the National Opinion Research Center with a panel of married women and single parous women (18–38 years old at the time of the base-line interviews) from randomly selected households in four New York City areas, containing about 70,000 residents each; a supplementary sample from a fifth area was interviewed once in 1967.[7] One or more interviews were conducted with a little over 1,000 women, 889 of whom were included in this study. Items concerned with abortion were included in all questionnaires. In the initial interviews—i.e., the ones conducted in 1965 with the panel and in 1967 with the supplementary sample—a thorough reproductive history was obtained. For each pregnancy, a question was asked (among others) about its outcome: whether it was a live birth, miscarriage, abortion done in a hospital, or abortion done elsewhere. In the second interview with the panel there were similar questions, intended to update the reproductive history for the 1965–1967 interim. Quite late in the 1967 interviews, for both the panel and the supplementary sample, there was a series of questions dealing with knowledge about ways to abort, persons who could perform an abortion, the abortion experience of friends, relatives and acquaintances, and, finally, the details of the respondent's own abortion experience.

Abortion Attempts

A total of 74 women, 8.3 percent of the 889 in the sample, said that they had attempted to abort one or more pregnancies; of these, 31 (3.5 percent of the sample) reported that the attempt had been successful. A total of 338 respondents, 38 percent of the sample, said that one of their friends, relatives or acquaintances had attempted to abort one or more pregnancies.

The responses indicate that in the population studied, abortions were most often attempted in the middle of the childbearing period rather than before marriage or after two or more children had been born. Seventy-six percent of the respondents were already married at the time they attempted to provoke a first abortion. Of those who reported more than one attempt, 89 percent were married when the second abortion attempt was made and 86 percent at the time of the third. This is consistent with data obtained from the office of the New York City medical examiner showing that over half the women who died from the

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Table 1. Percent distribution of abortion attempts, by number of respondents' living children at each attempt, New York City, as reported in 1965 and 1967

Abortion attempt	N	% by no. of children					
		0	1	2	3	≥4	Total
1st	74	23	31	23	13	9	100
2nd	33	0	34	30	18	18	100
3rd	12	0	34	8	50	8	100
All attempts	119	17	38	28	22	14	100

Notes: Percents may not add to 100 because of rounding. Table does not include seven abortion attempts where it is unknown if it was a first or later attempt.

aftereffects of abortion between 1953 and 1963 were currently married.[8]

Since no nulliparous single women were included in our sample, the information we have on the premarital nulliparous period is neither representative of fecundable nullipara nor contemporaneous with the interviews. Responses about premarital abortion attempts, therefore, are more subject to recall error than attempts made closer to the interview date. We doubt, however, that these factors could entirely explain the pattern of reported incidence in this population, which contrasts strongly with that of women who have obtained legal abortions in the United States since 1970—the overwhelming majority of whom are unmarried.[9]

Table 1 shows the number of living children that respondents reporting one or more abortion attempts had at the time they tried to terminate the pregnancy. It is clear that at both the first and second attempts most of the women had two or fewer children, and even at the third attempt, a large majority still had three or fewer. Less than a quarter of them had no children at the time they first tried to end a pregnancy, and none were nulliparous when second or third attempts to end pregnancy were made.

Subject to the cautions noted above, these findings indicate that induced abortion in poverty neighborhoods of New York City in the 1960s was predominantly used to stop pregnancies that came at an inappropriate time or from a union that was unsatisfactory, rather than to avoid a premarital pregnancy or to terminate childbearing after two or three children had been born.

Those Who Perform Abortions And The Methods Used

The success of an abortion attempt and the risk of complications are both closely associated with the skill of the person involved and the techniques utilized. Only 16 percent of all respondents said that they knew of a specific person who might help to terminate a pregnancy. Forty-three percent of these women (seven percent of the total) said that the person they had in mind was "just an ordinary woman" (i.e., a person without any specialized medical training). Only 23 percent (four percent of the total) said that the person was a physician. Sixteen percent of those who reported knowing of someone other than a physician (two percent of all respondents) said that they knew of people who would perform abortions for money, but did not indicate whether these persons had any specialized training. These findings confirm the common presumption that during the 1960s, women living in poverty neighborhoods had very limited access to medically supervised abortions.

Eighty percent of the respondents who reported actual abortion attempts said that they had tried to terminate the pregnancy themselves with no help from any other person. Only two percent of the respondents who attempted an abortion said that a doctor had been involved in any way. Regarding the attempted abortions reported for the respondents' friends, relatives and acquaintances, six percent were said to have been performed by doctors, 18 percent by "just ordinary women"; and 33 percent were said to have been self-induced.[*]

As for the known methods that people could use themselves to end a pregnancy, 74 percent of the 889 respondents replied that they knew of one or more methods. When the answers are classified by general type of method, 48 percent referred to a substance to be ingested orally. Some of these substances are relatively harmless, like herbal tea, but others, such as turpentine, can be quite dangerous.[†] Whether harmful or not, the oral methods are generally ineffective as abortifacients. More effective, but sometimes also dangerous, are techniques involving the insertion of something solid into the uterus; these accounted for 19 percent of the responses. In the majority of these cases, the women specified the object to be inserted as "the tube." A few respondents cited coat hangers and knitting needles, as well as a piece of bark, which, they said, expands after it is placed inside the uterus. Eleven percent of the replies mentioned the insertion of liquids—i.e., some form of douche.

Although the 889 respondents knew something about the abortion attempts of 338 friends, relatives and acquaintances, they could report the method used in only 214 (63 percent) of the cases. Where the method was known, uterine insertion (33 percent) was the most common type, followed by substances that were swallowed (30 percent). For the respondents themselves, methods taken by mouth were the most commonly reported. Forty-three of the 126 reported abortion attempts involved the swallowing of such potentially dangerous substances as Chlorox, turpentine or massive doses of quinine. Some of the women volunteered comments such as "God, was I sick." Other things taken by mouth were ruda tea, gin and various pills. Insertion of objects through the cervix and into the uterus, used in 19 percent of all attempts, came next in frequency, followed by douches, used in 11 percent (both techniques were used either singly or in combination with other methods).

In Table 2, the methods used by the respondents themselves are compared to those reported for their friends, relatives and acquaintances. One-third of their own attempts were reported to be successful, compared to 75 percent of the attempts they reported at second hand. This difference is very likely explained by the higher probability that a successful abortion will be mentioned to others than will an unsuccessful attempt. The comparative success rates of the different methods should be viewed with great caution. The numbers are small, and we cannot tell how complete and accurate the information obtained in the interviews was on this highly sensitive subject. In general, attempts where something was swallowed were less like-

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[*] A possible explanation for the large difference in the proportions of self-induced abortion attempts reported by the respondents for themselves and for their friends, relatives and acquaintances, may have to do with the degree to which the attempt is part of public knowledge. If someone other than the pregnant woman is to be involved, friends and relatives may well be called upon to recommend an abortionist. By the same token, if the attempt is to be entirely self-induced, there may be little incentive to discuss it with others. Knowledge about methods for self-induced abortion is probably obtained largely from women of an older generation, who would not be as likely to discuss it in terms of their own attempts as in more general terms.

[†] The different methods described in this study are quite similar to those found in an investigation of folk abortion methods in California. (See: L. Newman, "Abortion as Folk Medicine," *California's Health*, 23:75, 1965.)

Table 2. Reported abortion attempts among respondents and their friends, relatives and acquaintances, by method and outcome, New York City, as reported in 1965 and 1967

Method	Outcome				
	Survey respondents		Friends, relatives, acquaintances		
	No. of attempts	% successful	No. of attempts*	% successful	Deaths
Oral intake alone	40	23	60	55	0
Douche (soap, Lysol, other)	16	69	26	85	1
Tube through cervix	8	75	58	90	4
Other uterine insertion	4	100	7	86	1
Done by doctor	0	—	12	92	1
Baths	4	0	4	75	0
"Accidents" and exertion	2	0	2	0	0
Injections	2	50	18	72	0
Combinations†	49	22	—	—	—
Miscellaneous and unknown	1	0	135	74	4
Total	126	33	322	75	11

*Sixteen abortion attempts where the outcome was unknown are omitted from the table.

†Only one method was coded for reported attempts by friends, relatives and acquaintances. For the respondents themselves, when the combinations are included, 59 percent of all attempts involved oral intake and 34 percent of all attempts involved the swallowing of some dangerous substance.

ly to succeed than attempts where something was inserted into the uterus. According to the respondents, in 3.4 percent of the 322 abortion attempts reported for their social circle where the outcome was known, the person died in the attempt. This is a death-to-case rate more than 1,000 times the rate currently reported in the United States for legal abortions.[10] Although the number of abortions in the denominator is undoubtedly understated, and respondents would be more likely to know of abortions where death ensued than of uneventful terminations, this proportion nevertheless suggests strongly how dangerous clandestine abortions can be.

Subgroup Differences

The women included in the survey included Blacks, Puerto Ricans, West Indians, Hasidic Jews and other Whites, including representatives of various ethnic groups. Only Blacks and Puerto Ricans, however, were sufficiently numerous for detailed analysis of their responses (447 Blacks and 315 Puerto Ricans—85 percent of all respondents).

Reports of abortion attempts by women in the respondents' social circles were somewhat more frequent among Blacks (44 percent) than Puerto Ricans (35 percent), but there was no difference regarding their own attempts (10 percent and nine percent, respectively).

When the Black and Puerto Rican respondents are classified separately by socioeconomic status, slightly more abortion attempts are reported for friends, relatives and acquaintances, by those of higher status in both groups, but no difference is seen in the respondents' own attempts. However, Black women raised outside the South reported somewhat more attempts both for themselves and for their social circle than these raised in southern or border states. Among Catholics, the more religious women report somewhat fewer attempts, but the difference is small.

All in all, there seems to have been little variation between the subgroups of women living in poverty areas of New York City with respect to clandestine abortions in the 1960s. Factors relating to individual life circumstances were presumably much more important than gross sociological categories in determining who would and would not attempt to terminate an unwanted pregnancy at a time when it was very difficult to obtain a therapeutic abortion.

Summary

In surveys of poverty neighborhoods in New York City conducted in 1965 and 1967, it became apparent that clandestine abortions were more frequently reported as occurring when the woman was married and had one to three children than before marriage or after three children had already been born.

Knowledge of persons who could induce an abortion was not very common among the women interviewed, and most of those who were known did not have any specialized medical training. Physicians were involved in only two percent of the respondents' own reported abortion attempts* and in six percent of those among their friends, relatives and acquaintances.

There was a fairly large variety of methods known and used that were supposed to provoke an abortion. The largest proportion of these were substances taken by mouth—some of which, like turpentine, Chlorox and massive doses of quinine,[7] are quite dangerous. The next largest group involved uterine insertions. Other types of methods like massage and baths were quite rare. The popularity of the oral route of administration may be relevant to biomedical researchers who are developing new fertility regulating methods and are concerned about their acceptability.

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*No physicians actually performed any abortions. Their involvement was limited to completing self-induced abortions.

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Two Years' Experience with a Liberal Abortion Law: Its Impact on Fertility Trends in New York City

By Christopher Tietze, M.D

There has been a sharp decline in fertility in New York City – sharper than for the rest of the nation – since New York State liberalized its abortion law in 1970 to make termination of pregnancy by a licensed physician legally available virtually upon request up to 24 weeks of gestation. There has been an even greater decline – reversing a long-term trend – in illegitimacy. We seek to study in this article what has been the actual impact of the New York abortion law of 1970 on fertility trends in New York City.

Between July 1, 1970 (when New York State's liberalized abortion law took effect) and June 30, 1972, approximately 402,000 pregnancies were terminated legally in New York City – 173,900 in the first year and 228,100 in the second year.[1] These figures are based on

- pretabulated reports mailed weekly to the New York City Health Services Administration by proprietary, voluntary and some municipal hospitals, and by free-standing clinics;
- totals of abortions performed as reported weekly by telephone by the remaining municipal hospitals; and
- estimates made by the Health Services Administration for periods for which no weekly reports were submitted by some hospitals and clinics.

Weekly reports by mail and telephone account for about 92 percent of the total of 402,000 abortions, and estimates for about eight percent.

During the same two-year period, 334,900 individual certificates of termination of pregnancy, 83.3 percent of the estimated total, were filed with the New York City Department of Health. Although health regulations require that certificates of termination of pregnancy be filed within 48 hours, many are delayed far beyond the prescribed period. It appears likely that no certificates were filed or will ever be filed for some of the terminations performed during 1970-1972.

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To study the impact of legal abortions on fertility trends, it was necessary to separate local residents from women who came to New York City from other areas to have their pregnancies terminated, because only abortions of residents can be related to comparable pregnancies or births, or to women capable of becoming pregnant or giving birth. Residence status appears only on the certificates of termination of pregnancy filed with the health department. Hence, it was necessary to estimate the numbers of abortions of resident and nonresident women, based on the total numbers of legal abortions reported by mail or by telephone, or officially estimated for each category of institution, and on preliminary tabulations of certificates of termination, by date of reporting, made available by the health department.*

Residents and Nonresidents

Table 1 presents estimated numbers of legal abortions and percent distributions for New York City residents. Between 1970-1971 and 1971-1972, the total number of abortions of residents increased by 7,700 or 11.4 percent – from 67,400 to 75,100. They represented about 39 percent of all legal abortions in the first year, and about 33 percent in the second year.†

In 1970-1971, less than one percent of the resident women were younger than 15 years of age at the time their pregnancies were terminated, about six percent were under 18, 17 percent were under 20 years and almost three in five were in their twenties. The following 12-month period, from July 1, 1971 to June 30, 1972, brought a very slight shift toward younger ages.

The New York City Department of Health tabulates abortions by pregnancy order. In order to facilitate comparison with live births, which are tabulated by birth order, the distribution by pregnancy order was converted to a distribution by number of prior births using a cross-tabulation of the abortions reported to the Joint Program for the Study of Abortion (JPSA), in which about one-half of the total number was performed in New York City.[2]

In the first year of the liberal abortion law, almost one-half (47 percent) of the residents of New York City undergoing abortion were nulliparous, i.e., had experienced no prior birth. In 1971-1972, the proportion of nulliparous women was somewhat smaller and the share of women with prior births was correspondingly greater. Women with four or more prior births represented less than 10 percent of the total in either year.

In 1970-1971, roughly equal numbers of white and nonwhite (mostly black)

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* The numbers of abortions of resident and nonresident women presented in this report are estimates prepared by the author who is, therefore, professionally responsible for them. While the author believes that his estimates are very close to the facts and probably the best that can be made on the basis of available data, they will be subject to revision when the New York City Department of Health releases its definitive tabulations of certificates of termination by date of occurrence rather than by date of reporting. Because of the unofficial character of these estimates, the numbers of abortions have been rounded to the nearest hundred; percentages, ratios and rates were computed from unrounded figures.

† The estimates for both years may be too high, since some nonresident women may have given local addresses in order to obtain abortions in the municipal hospitals or on the general services of voluntary hospitals.

Table 1. Legal Abortions in New York City of Resident Women, by Selected Characteristics: Estimated Number and Percent Distribution, 1970-1971 and 1971-1972

Selected Characteristics	Estimated Number		Percent Distribution	
	1970-1971	1971-1972	1970-1971	1971-1972
Total	67,400	75,100	100.0	100.0
Age of Woman				
≦14	500	600	0.7	0.8
15-17	3,700	4,800	5.4	6.4
18-19	7,400	8,300	10.9	11.0
20-24	23,900	25,700	35.5	34.2
25-29	16,000	18,000	23.7	24.0
30-34	9,400	10,400	13.9	13.8
35-39	4,900	5,400	7.3	7.2
≧40	1,600	1,900	2.6	2.6
Prior Births				
0	31,800	32,700	47.1	43.5
1	11,900	14,600	17.6	19.4
2	11,000	13,100	16.3	17.5
3	6,600	7,700	9.8	10.3
4	3,400	3,900	5.1	5.1
≧5	2,700	3,100	4.1	4.2
Ethnic Group				
White	29,900	31,100	44.3	41.5
Puerto Rican	7,100	8,600	10.5	11.4
Nonwhite	30,400	35,400	45.2	47.1
Type of Institution				
Municipal Hospitals	30,200	26,900	44.9	35.8
Voluntary Hospitals	24,500	20,500	36.3	27.2
Proprietary Hospitals	8,100	10,000	11.9	13.4
Freestanding Clinics	4,600	17,700	6.9	23.6
Service				
Private	28,200	39,800	41.8	53.1
Nonprivate	39,200	35,300	58.2	46.9
Gestation (Weeks)				
≦12	49,400	61,800	73.2	82.3
13-20	15,200	11,500	22.6	15.3
≧21	2,800	1,800	4.2	2.4
Procedure				
Suction	32,000	50,800	47.5	67.7
D & C	21,500	14,700	31.9	19.5
Saline	12,800	9,000	18.9	12.0
Hysterotomy	1,100	600	1.7	0.8

women had abortions. More than 10 percent of the legal abortions involved women born in Puerto Rico. Most of those of Puerto Rican background who were born in New York or elsewhere in the continental United States are classified as white. In 1971-1972 the proportions of blacks and Puerto Ricans increased slightly, while that of whites decreased.

In 1970-1971, about 93 percent of the legal abortions of New York City residents were performed in hospitals and seven percent were performed in freestanding clinics. In the following year the hospitals' share dropped to 76 percent, while that of the clinics rose to 24 percent. Private patients – those aborted in proprietary hospitals, on the private services of voluntary hospitals or in clinics – represented 42 percent of all patients in 1970-1971, and 53 percent in 1971-1972. There was a corresponding decline from 58 percent to 47 percent in the proportion of nonprivate patients – those receiving abortion care in the municipal hospitals and on the general services of voluntary hospitals. The shift to private services in 1971-1972 reflected the greater availability and utilization of abortion clinics. Actually, this shift may not reflect any decline in patients whose abortions were subsidized by public funds, since some clinic abortions of residents are paid for through Medicaid.

Of greater importance than the personal characteristics of the women, and more important even than the circumstances (such as type of institution or service) under which the abortions were performed, is the period of gestation at which the pregnancies were terminated. Abortions in the second trimester – at 13 weeks of gestation or later – are associated with a much higher incidence of complications, including fatal complications, than abortions in the first trimester – at 12 weeks' gestation or earlier.[3] In addition, late abortions, especially those after 20 weeks of gestation, may involve emotional stress for the pregnant women as well as for such other persons involved as the nurses attending the expulsion of a relatively large and well-developed fetus. (A fetus at 20 weeks' gestation weighs about 10 ounces, compared with about one-half ounce at 12 weeks.)

In 1970-1971, about 73 percent of New York City resident abortions were performed during the first trimester, and 27 percent during the second trimester, including about four percent at more than 20 weeks. By 1971-1972, the proportion of first-trimester abortions had increased to 82 percent, and second-trimester abortions had dropped to less than 18 percent. Terminations at 21 weeks or later were reduced to less than one in 40 abortions. These changes probably reflect, in part, a growing awareness among women that abortion early in pregnancy is less dangerous than it is later on, and, in part, the greater availability of abortion services, especially in freestanding clinics, in the second year.

Virtually all abortions in New York City were performed by one of four procedures:

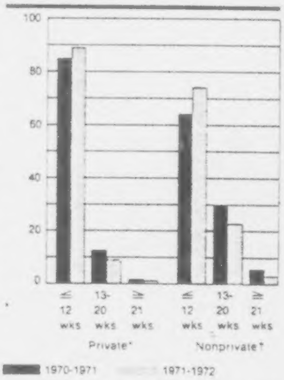
- suction, or vacuum aspiration,
- dilatation and curettage (D&C),
- instillation of hypertonic saline solution into the uterus, and
- hysterotomy, essentially a cesarean section at an earlier stage of pregnancy.

The choice of method is, to a large extent, a function of the duration of pregnancy at the time of the abortion. In the United States, almost all first-trimester abortions are done by the vaginal route (suction and D&C), and most abortions at 16 weeks or later, by instillation of saline. During the intervening three weeks, both approaches are used in suitable cases, although the conditions are not ideal for either one. Hysterotomy is a major operation, almost always performed in the second trimester.

In 1970-1971, more than 47 percent of all abortions of New York City residents were performed by suction, 32 percent by D&C, 19 percent by saline, and less than two percent by hysterotomy. The following year the share of abortions by suction increased to 68 percent, with corresponding declines in the other three procedures.

As shown in Table 2, the proportions of women 24 years of age or younger, of

Figure 1. Percent Distribution of Legal Abortions of Resident Women, by Service and Period of Gestation: New York City, 1970-1971 and 1971-1972



* In 1970-1971 there were 28,200, and in 1971-1972 there were 39,800 abortions on private services.

† In 1970-1971 there were 39,200 and in 1971-1972 there were 35,300 abortions on nonprivate services.

Table 2. Legal Abortions in New York City of Resident Women, by Service, by Selected Characteristics: Total Number and Percent Distribution, 1970-1971 and 1971-1972

Selected Character-istics	Percent Private		Percent Nonprivate	
	1970-1971 (N = 26,200)	1971-1972 (N = 39,800)	1970-1971 (N = 39,200)	1971-1972 (N = 35,300)
Age of Woman				
≦14	0.4	0.7	0.9	1.0
15-17	4.2	5.1	6.4	7.8
18-19	8.8	10.0	12.5	12.2
20-24	33.7	33.2	35.7	35.2
25-29	24.6	24.8	23.0	23.0
30-34	15.6	14.7	12.6	12.8
35-39	9.0	8.3	6.0	6.1
≧40	3.5	3.2	1.9	1.9
Prior Births				
0	55.4	49.6	41.1	36.6
1	14.8	18.2	19.6	20.8
2	14.6	15.9	17.6	19.3
3	8.3	8.9	10.9	11.8
4	3.9	4.2	5.9	6.2
≧5	3.0	3.2	4.9	5.3
Ethnic Group				
White	65.9	56.9	29.5	24.0
Puerto Rican	5.8	8.2	13.9	15.2
Nonwhite	29.3	34.9	56.6	60.8
Gestation (Weeks)				
≦12	85.9	89.3	64.0	74.4
13-20	12.5	9.4	29.9	22.1
≧21	1.6	1.3	6.1	3.5
Procedure				
Suction	55.4	71.5	41.8	63.4
D & C	36.2	22.1	28.8	16.7
Saline	7.1	5.9	27.4	18.8
Hysterotomy	1.3	0.5	2.0	1.1

women with one or more prior births, and especially of nonwhite and Puerto Rican women were higher among nonprivate patients than among private patients. Nonprivate patients also had relatively more abortions in the second trimester. To what extent this was due to bureaucratic delays to which nonprivate patients may have been subjected or to earlier requests for abortion by private patients requires further study. However, the proportions of second-trimester abortions, and especially of abortions at 21 weeks or later, declined more among nonprivate patients than among private patients from 1970-1971 to 1971-1972 (see Figure 1, p. 37).

Table 3 shows estimated numbers of legal abortions and percent distributions by selected characteristics for nonresidents. The total number of nonresidents in the second year increased by 44 percent – from 106,500 in 1970-1971 to 153,000 in 1971-1972.

The proportions of women younger than 25 years of age, of nulliparous women and of white women were substantially higher among those who came from out of town than among New York City residents. It is not surprising that virtually all of the nonresidents obtained abortions as private patients (they are not eligible for New York State Medicaid or for service in the municipal hospitals), with more than 60 percent served by freestanding clinics in 1971-1972.

Table 3. Legal Abortions in New York City of Nonresident Women, by Selected Characteristics: Estimated Number and Percent Distribution, 1970-1971 and 1971-1972

Selected Characteristics	Estimated Number		Percent Distribution	
	1970-1971	1971-1972	1970-1971	1971-1972
Total	**106,500**	**153,000**	**100.0**	**100.0**
Age of Woman				
≦14	700	1,800	0.7	1.4
15-17	9,900	18,100	9.3	11.8
18-19	20,600	31,900	19.3	20.9
20-24	41,100	53,900	38.5	35.2
25-29	15,600	22,200	14.6	14.5
30-34	9,600	13,400	9.0	8.8
35-39	6,300	8,200	6.0	5.4
≧40	2,700	3,500	2.6	2.3
Prior Births				
0	72,500	98,400	68.0	64.3
1	11,600	20,000	10.9	13.1
2	10,600	16,500	10.0	10.8
3	6,600	9,900	6.2	6.4
4	3,100	4,700	2.9	3.1
≧5	2,100	3,500	2.0	2.3
Ethnic Group				
White	95,400	130,500	89.6	85.3
Puerto Rican	600	1,300	0.6	0.8
Nonwhite	10,500	21,200	9.8	13.9
Type of Institution				
Municipal Hospitals	1,600	900	1.5	0.6
Voluntary Hospitals	14,600	7,700	13.7	5.1
Proprietary Hospitals	41,900	51,900	39.3	33.9
Freestanding Clinics	48,400	92,500	45.5	60.4
Service				
Private	103,400	150,900	97.1	98.6
Nonprivate	3,100	2,100	2.9	1.4
Gestation (Weeks)				
≦12	86,200	124,100	80.9	81.1
13-20	18,200	25,100	17.1	16.4
≧21	2,100	3,800	2.0	2.5
Procedure				
Suction	67,400	111,500	63.3	72.8
D & C	25,800	22,600	24.2	14.8
Saline	12,900	18,600	12.1	12.2
Hysterotomy	400	300	0.4	0.2

Table 4. Legal Abortions in New York City of Resident Women, by Selected Characteristics: Ratios and Rates, 1970-1971 and 1971-1972

Selected Character-istics	Abortion Ratio per 1,000 Live Births Six Months Later		Abortion Rate per 1,000 Women 15-44	
	1970-1971	1971-1972	1970-1971	1971-1972
Total	511.2	650.1	39.4	43.4
Age of Woman*				
≦19	518.2	na	37.8	45.2
20-24	523.5	na	65.9	71.1
25-29	420.6	na	50.2	53.0
30-34	537.4	na	37.9	40.0
35-39	715.5	na	21.2	24.0
≧40	1,077.2	na	6.9	8.0
Prior Births				
0	569.0	na	na	na
1	313.1	na	na	na
2	583.9	na	na	na
3	725.1	na	na	na
4	734.3	na	na	na
≧5	494.7	na	na	na
Ethnic Group				
White	417.5	na	29.4	31.7
Puerto Rican	338.4	na		
Nonwhite	773.9	na	64.7	71.8
Service				
Private	400.6	na	na	na
Nonprivate	637.8	na	na	na

* For ratios, age at time of conception, and for rates, age at time of termination.
na = not available

During 1970-1971, the proportion of second-trimester abortions was substantially lower among nonresidents than among residents, but in the following year it was slightly higher. Within the nonresident group there was little change in distribution by gestation from the first year to the second.

Ratios and Rates

Table 4 presents two measures of the relative frequency of abortions: abortion ratios and abortion rates. The abortion ratios indicate the numbers of abortions per 1,000 live births six months later, the abortion rates are the numbers of abortions per 1,000 women 15-44 years of age at the midpoint of the period during which the abortions occurred. Abortion ratios and rates are computed for resident women only, since the relevant numbers of births and of women of reproductive age are not available for nonresidents.

The overall abortion ratio for 1970-1971 was 511 per 1,000 live births in 1971. In 1971-1972, it rose to 650 per 1,000 live births in 1972. The abortion rate per 1,000 women of reproductive age increased from 39 in 1970-1971 to 43 in 1971-1972. The relative increment was greater for the abortion ratio (26 percent) than for the abortion rate (10 percent) because the denominator of the ratio—the number of births—declined, while the denominator of the rate—the female population 15-44—increased.

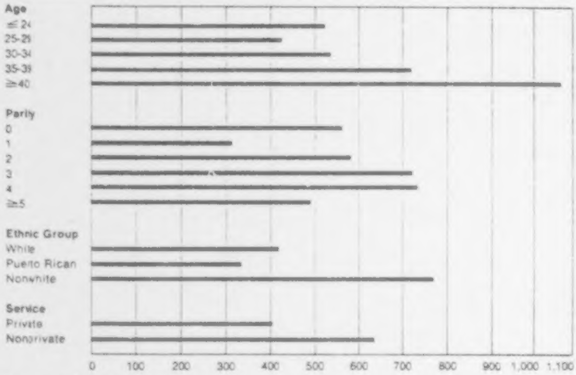
Age-specific abortion ratios were computed in terms of estimated ages at conception, the latter assumed to have preceded the abortions by three months, and the live births by nine months. In 1970-1971, abortion ratios were close to the average of 511 per 1,000 live births for each age group of women under 25 years of age, then dropped to 421 for conceptions in the late twenties, followed by a steady rise to 1,077 for women in their forties (see Figure 2).

The pattern of age-specific abortion rates was quite different. Rates were closest to the average (39 per 1,000 women of reproductive age in 1970-1971) among women 19 or younger (38), highest among women in their early twenties (66), followed by an accelerating decline to very low rates among women in their forties (7). Age-specific abortion rates were higher for each age group in the second year than in the first. The close association between abortion rates and the age patterns of pregnancies and births is apparent. Abortion ratios cannot be computed for 1971-1972 because the distribution of live births by age of mother is not yet available for 1972.

The pattern of abortion ratios by number of prior births differs significantly from the pattern by age. The ratio is moderately high (569) for nulliparae, drops to the lowest value in the entire table (313) for women with one prior birth, and then rises steadily to a high of 734 for women with four prior births. The abortion ratio drops sharply to 495 among women with five or more prior births; this group includes many women who, for religious or other reasons, did not obtain abortions in earlier pregnancies and are not obtaining them now.

The moderately high abortion ratio for nulliparous women probably conceals a very high ratio for unmarried women and a correspondingly low ratio for married women. Fragmentary data suggest that the ratio may have been on the order of 2,000 abortions per 1,000 first births conceived out of wedlock, and about 125 abortions per 1,000 first births conceived after marriage. The discrepancy becomes even greater if the ratios are computed in terms of the woman's marital status at the time of abortion or birth – approximately 1,500 per 1,000 births for unmarried women compared with 100 for married women. These data suggest that legal abortion has been a major factor accounting for the unprecedented decline in the number of illegitimate births in New York City in 1971 (a drop from 31,900 to 28,100 – or nearly 12 percent) – the first year-to-year decline reported since 1954, when such records first were kept.[4]

Figure 2. Abortion Ratios per 1,000 Live Births among New York City Residents, by Age,* by Parity, by Ethnic Group and by Service: 1970-1971



* Age at time of conception

Abortion ratios and rates for nonwhite women were substantially higher than the corresponding ratios and rates for white women, probably because of a differential in successful utilization of the most effective contraceptive methods.

Over the five-year period 1966-1970, the number of births per 1,000 women of reproductive age (15-44) in New York City was 84.3 for white women and 97.1 for nonwhite women. According to the 1970 National Fertility Study, about 42 percent of all births to white women and 61 percent of births to nonwhite women were unwanted at the time of conception or ever (number failures), or they were not wanted at the time they occurred, but wanted at some later time (timing failures).[5] Application of these nationwide percentages to New York City suggests rates of such number and timing failures of about 35 per 1,000 white and of 59 per 1,000 nonwhite women of reproductive age. These rates are of the same order of magnitude as the abortion rates for 1970-1972 shown in Table 4, indicating that New York's liberalized law has made it possible for women of all ethnic groups to have the number of children they want when they want them.

The abortion ratio for Puerto Rican women (338) was lower than for whites (418) and less than half that of nonwhites (774). This may reflect the high frequency of contraceptive sterilization among Puerto Rican women who have borne all the children they want,[6] as well as the Catholic-Hispanic tradition rejecting abortion. Abortion rates could not be computed for Puerto Rican women because their distribution by age and place of birth is not yet available from the Census of 1970. Hence, Puerto Rican women were included with the white population for the computation of abortion rates. Since the overwhelming majority of Puerto Ricans are classified as white in the Census and in the health department's statistics on mothers of liveborn infants, 90 percent of the abortions of Puerto Rican women were added to the abortions of white women and 10 percent to the abortions of nonwhite women.

The final pair of abortion ratios in Table 4 compares patients on private and nonprivate services. The ratio turns out to be more than 50 percent higher in 1970-1971 for nonprivate patients. This is quite different from the situation in New York City a few years prior to the enactment of the liberal abortion law of 1970. For 1965-1967, the ratio of therapeutic abortions was 4.3 per 1,000 live births for private patients, while for nonprivate patients the abortion ratio was 1.8 per 1,000 live births.[7]

These figures should be interpreted with caution, however, since the women who utilize private and nonprivate abortion services do not necessarily represent the same economic groups as women delivered on the private and nonprivate services of hospitals.

Impact on Fertility Trends

What has been the impact of the liberal abortion law on birth trends in New York City? The answer to this question depends on one's assessment of the relative magnitude of the several categories of pregnancies that may be terminated by legal abortion when this procedure is readily accessible. These are:

- pregnancies that would have resulted in the birth of a child not wanted either then or ever (number failures);
- pregnancies that would have resulted in the birth of a child not wanted at the time, but wanted later (timing failures)—including most out-of-wedlock pregnancies;
- pregnancies reflecting the increased numbers of women in the population who are able to conceive again because their pregnancies were terminated by abortion;
- pregnancies that would have been terminated on medical indication under earlier, more restrictive legislation;
- pregnancies that would have been terminated by illegal abortion; and
- pregnancies resulting from a relaxation of contraceptive effort in response to easier access to abortion.

Of these six categories, prevention of number failures makes the major contribution to a reduction of fertility in the long run. Prevention of timing failures reduces births in a given year, but most of these are probably made up in subsequent years. However, a delay in conception increases the interval from one generation to the next, which, in turn, reduces the rate of population growth. What is more, to some extent, births delayed will never take place. Pregnancies resulting from an increase in the number of women able to conceive because they were aborted is of minor demographic importance in a population, such as New York City's, which practices contraception with even moderate success. Few pregnancies were terminated by legal abortion under New York's old restrictive abortion law, which was conservatively interpreted by the medical profession.[8] So this category also is of minor significance. The extent to which legal abortions have replaced illegal procedures depends primarily on the number of illegal abortions in the community prior to legalization, as well as on the relative costs and circumstances under which legal abortions can be obtained. It has been suggested that legal abortion has led to a relaxation of contraceptive effort; the existence of such a change in behavior, however, has not been demonstrated.

Our estimate of 67,400 legal abortions of resident women from July 1, 1970 to June 30, 1971 represents an increment of about 65,000 over those performed during the preceding 12 months. Most pregnancies terminated during the 12 months ending June 30, 1971 would have produced full-term infants during 1971. The number of live births registered in New York City during that year was about 131,900, compared with 149,200 in 1970, indicating a decline of 17,300 births, or 11.6 percent. Application of the age-specific fertility rates of 1970 to the age distribution of women in 1971 generates an expected total of 150,700 births, thus creating an imputed decline of 18,800 births, or 12.6 percent.

Accepting the actual decline of 17,300 births in New York City from 1970 to 1971 and the imputed decline of 18,800 as a first approximation of the range of the number of births prevented or postponed by legal abortion, the next step is to estimate the number of abortions required to achieve this decline. Since most legal abortions in New York City appear to involve either women who practiced contraception more or less consistently, or else unmarried primigravidae (women pregnant for the first time), whose exposure to the risk of conception may be assumed to remain relatively infrequent, a ratio of 1.2 abortions replacing one live birth is probably an appropriate estimate.[9] Hence, 20,800-22,600 legal abortions, or 32-35 percent of the increment of 65,000 legal abortions from 1969-1970 to 1970-1971, may have been required to prevent 17,300-18,800 births six months later. This estimate suggests that, during the first year under the new law, between 42,400 and 44,200 of the legal abortions of New York City residents involved pregnancies which, without legalization, would have been terminated by illegal abortion, or, possibly, included some pregnancies resulting from a deterioration of contraceptive practice.

During the second year under the liberalized abortion law, the estimated number of abortions of New York City residents was 75,100, representing an increase of 7,700 over the corresponding total for the preceding 12 months. Live births during 1972 numbered 115,500, representing a decline of 16,400 from the 131,900 births registered in 1971. Application of the age-specific fertility rates of 1971 to the projected age distribution of women in 1972 generates a total of 134,500 expected births, 19,000 more than the number registered in 1972. Given this range, the decline in the number of births from 1971 to 1972 would be from 2.1 to 2.5 times the estimated increment in the number of legal abortions among local residents six months earlier.

Unless we are willing to concede that our estimates of abortions among residents of New York City are so far off the mark in 1970-1971 and/or 1971-1972 as to be worthless as indications of the true levels, we are forced to accept the following three conclusions:

- There is no evidence that the number of pregnancies increased during the second year of the liberalized abortion law, which makes it highly unlikely that a significant number of pregnancies resulting from a deterioration of contraceptive practice occurred even during the first year. Hence, virtually all of the increment in legal abortions in 1970-1971 which did not replace unwanted or mistimed (mostly out-of-wedlock) births terminated pregnancies which would otherwise have been terminated by illegal abortions in the earlier period.
- It is unlikely that the sharp decline in illegal abortion from 1969-1970 to 1970-1971 continued in the next 12 months, partly because illegal abortions had already reached a low level.[10]
- Changes in reproductive behavior other than more frequent legal abortions contributed significantly to the decline in the number of births in New York City from 1971 to 1972. If the proposition is accepted that 1.2 abortions were required to replace one birth, about 6,400 births were prevented by the increment of 7,700 legal abortions from 1970-1971 to 1971-

1972, or fewer if illegal abortions continued even a modest decline. This leaves a residual of at least 10,000 and perhaps as many as 12,600 births prevented or postponed by other changes in reproductive behavior.

The most easily demonstrable among these other changes would be widespread postponement of marriage, indicated by a sharp decline in the number of marriages. Such a decline, however, did not occur in New York City. The total number of marriages dropped by about 1,000, from a high of 77,300 in 1970 to 76,300 in the following year. It appears unlikely that this minor decline contributed significantly to the much greater reduction in the number of births during the following year.

Other changes in reproductive behavior are less easily demonstrated or, for that matter, refuted. Most important among these would be a more general and/or more effective practice of fertility regulation, which in turn could reflect changing preferences in regard to family size and birth spacing as well as increasing availability of highly effective contraceptive methods, including a growing acceptance of surgical sterilization.[11] A five percent decline in employment in New York City from 1969 to 1971 doubtless contributed to the decisions of many couples to postpone childbearing.[12]

Demonstrable or not, these factors must have been operative on a major scale in 1971-1972 and probably also in 1970-1971. Hence, our original estimate of 17,300 to 18,500 unwanted births prevented or postponed by legal abortions during the first year of the liberal abortion law is probably too high, and the corresponding estimate of 42,400 to 44,200 illegal abortions replaced by legal abortions too low. We may assume – arbitrarily and solely for purposes of illustration – that the impact in 1971 of changes in reproductive behavior other than increased utilization of legal abortion was one-half of what it appears to have been in 1972, or the equivalent of 5,000-6,300 fewer births. Under this assumption, the unexplained decline in the number of births from 1970 to 1971 would be in a range from 12,[illegible] to 13,800; the number of legal abortions required to achieve this decline would be somewhere between 13,200 and [illegible] (or [illegible]-25 percent of the increment of [illegible] legal abortions over those performed in [illegible] 1969-1970), and the number of illegal abortions replaced by legal abortions [illegible] of the order of 48,400-51,800. The latter estimate, more appropriately approximated by an order of magnitude of about 50,000, may also serve as an indication of the minimum number of illegal abortions involving residents of New York City, which had been obtained locally or elsewhere prior to the liberalization of the abortion law in 1970.

Summary

Over the two-year period from 1970 to 1972, the annual number of live births in New York City declined by 33,700 (or 23 percent), from 149,200 in 1970 to 115,500 in 1972. If the changes in age distribution of the female population are taken into account, the birth decline increases to 37,800 (or 25 percent). According to our estimates, the greater utilization of legal abortion, made possible by the liberalization of the law in 1970, accounted for about one-half of the decline – on the order of 17,000-21,000 births; other changes in reproductive behavior accounted for the remainder. A far more significant effect of liberalization of the abortion law has been the replacement of dangerous, discriminatory, undignified and costly illegal abortions by legal abortions performed under medical auspices, accessible to and utilized by all the city's economic and ethnic groups, as well as by many women from other states. Approximately 70 percent of the legal abortions of resident women performed under the 1970 law replaced illegal abortions–about 50,000 illegal procedures each year. Finally, there is no indication that easier access to legal abortion has led to a widespread deterioration of contraceptive practice. On the contrary, indirect evidence suggests that, overall, contraceptive practice improved markedly between the first and second years of the liberalized abortion law, perhaps related to the contraceptive counseling which is provided in most of New York's well-run abortion services.

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DEMOGRAPHY© Volume 18, Number 4 November 1981

VARIATIONS IN INFANT MORTALITY RATES AMONG COUNTIES OF THE UNITED STATES: THE ROLES OF PUBLIC POLICIES AND PROGRAMS

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Abstract—The purpose of this paper is to shed light on the causes of the rapid decline in the infant mortality rate in the United States in the period after 1963. The roles of four public policies are considered: Medicaid, subsidized family planning services for low-income women, maternal and infant care projects, and the legalization of abortion. The most striking finding is that the increase in the legal abortion rate is the single most important factor in reductions in both white and nonwhite neonatal mortality rates. Not only does the growth in abortion dominate the other public policies, but it also dominates schooling and poverty.

From 1964 to 1977, the infant mortality rate in the United States declined at an annually compounded rate of 4.4 percent per year. This was an extremely rapid rate of decline compared to the figure of 0.6 percent per year from 1955 to 1964. The reduction in mortality proceeded at an even faster pace in the 1970s than in the late 1960s (5.2 percent per year from 1971 to 1977 versus 3.8 percent per year from 1964 to 1971).[1]

The period from 1964 to 1977 witnessed the introduction of Medicaid, maternal and infant care projects, Federally subsidized family planning services for low-income women, the legalization of abortion, and the widespread adoption of oral and intrauterine contraceptive techniques. These developments have been [illegible] to in discussions of the cause of [illegible] acceleration in the downward trend [illegible] infant mortality (for example, Eisner [illegible] al., 1978; Lee et al., 1980), but the question has not been studied in a multivariate context. Moreover, the relative contribution of each factor has not been quantified. The purpose of this paper is to estimate the impacts of public policies and programs on infant mortality.

ANALYTICAL FRAMEWORK

Economic models of the family and household production developed by Becker and Lewis (1973) and Willis (1973) provide a fruitful theoretical framework to generate multivariate health outcome functions and to assess the roles of social programs and policies in these functions. Ben-Porath (1973), Ben-Porath and Welch (1976), Williams (1976), and Lewit (1977) have utilized the economic model of the family to study theoretically and empirically the determinants of birth outcomes. Following these authors, we assume that the parents' utility function depends on their own consumption, the number of births, and the survival probability. Both the number of births and the survival probability are endogenous variables. In particular, the survival probability production function depends upon endogenous inputs of medical care, nutrition, and the own time of the mother. In addition, the production function is affected by the reproductive efficiency of the mother and by other aspects of her efficiency in household production. Given the considerable body of evidence that education raises market and nonmarket productivity, one would expect more educated mothers to be more efficient producers of surviving infants.

The above model calls attention to the important determinants of the survival probability and its complement, the infant mortality rate. In general this set of determinants is similar to that used in multivariate studies of infant mortality with different and fewer theoretical points of departure (for example, Fuchs, 1974; Williams, 1974; Brooks, 1978; Gortmaker, 1979). Moreover, the model provides a ready structure within which to interpret the effects of public programs and policies on infant mortality.[2] Thus, Medicaid and maternal and infant care projects lower the direct and indirect costs[3] of obtaining prenatal and obstetrical care, which should increase the likelihood of a favorable birth outcome and lower infant mortality. Federal subsidization of family planning services, abortion reform, and the diffusion of oral and intrauterine contraceptive techniques (the pill and the IUD) reduce the costs of birth control and increase its availability. Within the context of an economic model of the family, these developments raise the "optimal" survival probability and lower the "optimal" number of births. In addition, they will lower the observed infant mortality rate if less healthy fetuses are less likely to be conceived or more likely to be aborted.[4]

To measure the relative importance of the above factors in the recent U.S. infant mortality experience, a cross-sectional regression analysis of variations in infant mortality rates is performed among counties of the United States in 1971. This procedure capitalizes on variations in the programs at issue among counties at a moment in time. Thus it provides a set of impact coefficients to identify the contribution of each program net of basic determinants of infant mortality such as poverty, schooling levels, and the availability of physicians. After estimating the regression, its coefficients are applied to national trends in the exogenous variables between 1964 and 1977 to "explain" the trend in infant mortality.

This methodology has a number of desirable properties. It mitigates the multicollinearity problems that almost certainly would arise in a time-series regression analysis for the United States as a whole. Moreover, the state-of-the-art in neonatology, which has changed over time and is difficult to quantify, is constant in the cross section. Finally, with the exception of abortion reform, the programs that we study are aimed at poor persons. Therefore, the appropriate way to measure their impacts is to interact the policy variables with the fraction of births to poor women. This insight is incorporated into the basic regression specification.

The last point is worth spelling out in more detail. Let d_{pj} be the infant mortality rate of babies born to poor mothers (infant deaths divided by live births) in the j^{th} county, and let d_{nj} be the infant mortality rate of babies born to nonpoor mothers. As an identity,

$$d_j = k_j d_{pj} + (1 - k_j)\, d_{nj}, \qquad (1)$$

where d_j is the observed infant mortality rate and k_j is the fraction of births to poor mothers. Specify behavioral equations for d_{pj} and d_{nj} as follows:

$$d_{pj} = \alpha_0 + \alpha_1 x_{pj} + \alpha_2 y_{pj} + \alpha_3 w_{pj} + \alpha_4 z_j \qquad (2)$$

$$d_{nj} = \beta_0 + \beta_2 y_{nj} + \beta_3 w_{nj} + \beta_4 z_j. \qquad (3)$$

In these equations, x_{pj} is a vector of policy variables that affects the mortality rate of poor babies alone such as Medicaid; $w_{ij}(i = p, n)$ is a vector of policy variables that affects both groups such as the group-specific abortion rate (legal abortions per thousand live births); y_{ij} refers to a group-specific vector of basic determinants of infant mortality such as mother's schooling; and z_j is a vector of variables that has the same value for each group such as physicians per capita. Since there are no data on income-specific mortality rates at the county level, substitute equations (2) and (3) into equation (1) to obtain

$$dj = \beta_0 + (\alpha_0 - \beta_0)k_j + \alpha_1 k_j x_{pj} + \alpha_2 k_j y_{pj} + \beta_2(1 - k_j)y_{nj} + \alpha_3 k_j w_{pj} + \beta_3(1 - k_j)w_{nj} + \alpha_4 k_j z_j + \beta_4(1 - k_j)z_j. \qquad (4)$$

Equation (4) gives a multiple regression of d_j on eight variables (vectors): k_j, $k_j x_{pj}$, $k_j y_{pj}$, $(1 - k_j)y_{nj}$, $k_j w_{pj}$, $(1 - k_j)w_{nj}$, $k_j z_j$, and $(1 - k_j)z_j$. Attempts to estimate this equation would be plagued by severe problems of multicollinearity and by the absence of income-specific measures of certain variables such as the legal abortion rate. Therefore, we assume that the income-specific abortion rate (w_{ij}) is proportional to its weighted average ($w_{ij} = r_i w_j$). In addition, we assume that schooling of poor mothers in a given county is proportional to schooling of nonpoor mothers ($y_{pj} = sy_{nj}$). The actual equation that we fit is

$$d_j = \beta_0 + (\alpha_0 - \beta_0)k_j + \alpha_1 k_j x_{pj} + \delta_2 y_{nj} + \delta_3 w_j + \delta_4 z_j, \qquad (5)$$

where δ_2 estimates $\alpha_2 k_j s + \beta_2(1 - k_j)$, δ_3 estimates $\alpha_3 k_j r_p + \beta_3(1 - k_j)r_n$, and δ_4 estimates $\alpha_4 k_j + \beta_4(1 - k_j)$. The important point to note is that we employ k_j and the product of k_j and x_{pj} as independent variables in the regression. Thus, we employ a specification that explicitly recognizes that the impact on the observed infant mortality rate of policies aimed at the poor is larger the larger is the fraction of births to poor mothers ($\partial d_j/\partial x_{pj} = k_j\alpha_1$). Moreover, our specification yields a direct estimate of the impact parameter (α_1).

A more general formulation of the above model can be developed by decomposing the observed infant mortality rate in the j^{th} county into rates associated with a variety of birth characteristics such as mother's age, mother's income, parity, birth weight, and legitimacy status of the birth:

$$d_j = \sum_{i=1}^{m} k_{ij}\, d_{ij} \qquad (6)$$

In this equation k_{ij} is the fraction of births in the i^{th} category and d_{ij} is the infant mortality rate associated with that category. An example of one such category is an illegitimate, low-birth weight birth to a low-income, teenage mother with no previous live births. The policies studied here might lower the observed infant mortality rate by lowering the fraction of births in high-risk categories (categories where d_{ij} is higher than on average) and by lowering the mortality rate in a given risk category (d_{ij}). These regression estimates incorporate both effects because there is no control here for characteristics such as the percentage of births to teenage mothers, the percentage of illegitimate births, the percentage of fourth and higher-order births, and the percentage of low-birth weight births. The percentage of births to low-income mothers is included, but as indicated below a measure is employed that varies among counties only because the percentage of the population in poverty varies among counties.

Note that some discussions of the probable impacts of abortion reform on infant mortality assume that this public policy operates solely by reducing the percentage of high-risk births, especially the percentage of low-birth weight births (for example, Lee et al., 1980). Yet abortion reform also might lower infant mortality by lowering risk-specific death rates. In particular, more prenatal and perinatal care may be allocated to pregnancies that are not aborted. Indeed, in the context of the economic model of the family outlined above (Becker and Lewis, 1973; Willis, 1973), it is likely that a reduction in the cost of birth control will have a larger impact on the amount of medical care demanded and therefore on the survival probability than a reduction in the price of care. The reason is that a reduction in the cost of fertility control raises the cost (price) of a birth, while a reduction in the price of medical care lowers the cost of a birth. Although both developments almost certainly will raise the optimal survival probability, a reduction in the cost of fertility control will lower the optimal birth rate, while a reduction in the price of care may increase it. This point should be kept in mind when the effects of abortion reform on infant mortality are compared to the effects of Medicaid coverage of prenatal and perinatal care services.[5]

EMPIRICAL SPECIFICATION

Data and Measurement of Infant Mortality

The basic data set used here is the Urban Institute's expanded version of the Area Resource File (ARF). The ARF is a county-based data service, prepared by Applied Management Sciences, Inc., for the Bureau of Health Professions, Health Resources Administration, U.S. Department of Health and Human Services. It incorporates information from a variety of sources for 3,078 counties in the United States. These counties can also be aggregated into larger geographic areas such as county groups, Standard Metropolitan Statistical Areas, and states. Demographic and socioeconomic characteristics are taken from the 1970 Census of Population. Socioeconomic characteristics of women ages 15 to 49 come from the 1970 Census of Population, Women of Childbearing Age Tape. Deaths by age, race, and sex for the years 1969 through 1976 are obtained from the National Center for Health Statistics (NCHS) Mortality Tape. Births by race for those years are obtained from the NCHS Natality Tape. Health manpower and facilities come from the American Medical Association, the American Hospital Association, and other sources. We have added measures pertaining to the policies and programs discussed previously to the ARF from sources indicated in the next section.

There are two components of infant mortality: neonatal mortality and postneonatal mortality. Neonatal mortality refers to deaths of infants within the first 27 days of life. Postneonatal mortality refers to deaths of infants between the ages of 28 and 364 days. Neonatal deaths are usually caused by congenital abnormalies, prematurity, and complications of delivery; while postneonatal deaths are usually caused by infectious diseases and accidents.

This empirical analysis is limited to the neonatal mortality rate, defined as neonatal deaths per thousand live births. Since the causes of the two types of infant deaths are dissimilar, socioeconomic variables and public programs are likely to have different effects on each. Specifically, these policy variables are more relevant to neonatal mortality than to postneonatal mortality. For instance, the former is considerably more sensitive to appropriate prenatal and obstetrical care than the latter (Lewit, 1977). Another reason for this focus is that the neonatal mortality rate is much larger than postneonatal mortality rate; it was three times as large in 1971. Consequently, trends in the infant mortality rate are dominated by trends in the neonatal mortality rate. Obviously, one cannot hope to explain trends in the infant mortality rate without being able to explain trends in the neonatal mortality rate.

Separate regressions are fitted for white neonatal mortality and for black neonatal mortality. Black neonatal mortality rates are much higher than white rates. In a non-race-specific regression, one would enter the percentage of black births to control for race differences. But this variable would be highly correlated with the percentage of births to low-income women, schooling, and other independent variables. By fitting race-specific regressions, multicollinearity is reduced and the coefficients of the independent variables are allowed to vary between races. Linear regressions are estimated because a linear specification facilitates the aggregation of the two income-specific mortality rate functions given in the first section of this paper into a single equation for the entire population.

Counties are used rather than states or Standard Metropolitan Statistical Areas (SMSAs) as the units of observation. SMSAs and states are very large and sometimes heterogenous. Income, schooling levels, medical resources and other variables may vary greatly within an SMSA or a state. Since counties are much more homogeneous, these problems are reduced in our research. A weakness with the use of counties is that the small size of some of these areas may mean that people may receive medical care outside the county. Moreover, the small number of births in certain counties may increase the importance of random movements or "noise" in the determination of regression coefficients.

These problems with county data are reduced by including in the regressions only counties with a population of at least 50,000 persons in 1970. A county must also have at least 5,000 blacks for inclusion in the black regressions. There are 679 counties in the white regressions and 359 counties in the black regressions. In addition to selecting large counties, we attenuate random elements by employing a three-year average of the race-specific neonatal mortality rate for the period 1970–72 as the dependent variable and by estimating weighted regressions, where the set of weights is the square root of the race-specific number of births in 1971.

Neonatal mortality for the period 1970–72 is studied because measures of all independent variables are available for a year in that period or for 1969. In addition, it provides an ideal time frame to estimate the impact of abortion reform because of substantial cross-sectional variations in the legal abortion rate in that period. Abortion reform proceeded at a rapid pace between 1967 and the middle of 1970. Prior to 1967 all states of the United States had laws which permitted abortion only when it was necessary to preseve a pregnant woman's life. Beginning in 1967 some states started to reform these laws to increase the number of circumstances under which abortions could be performed. The reformed statutes legalized abortions if there was a substantial risk that continuance of the pregnancy would seriously impair the physical or mental health of the woman, or that the child resulting from the pregnancy would be born with a serious physical or mental defect, or in cases of pregnancy resulting from rape or incest. By 1970, twelve states had enacted such statutes. Moreover, in 1970 four additional states enacted extremely liberal abortion laws which placed no legal restriction on the reasons for which an abortion may be obtained prior to the viability of the fetus (Center for Disease Control, 1971). After the middle of 1970, there was no significant changes in abortion law until 1973 when the Supreme Court ruled most restrictive state abortion laws unconstitutional. Concurrent with these reforms, the U.S. ratio of legal abortions per thousand live births rose from 4 in 1969 to 180 in 1972 and to 361 in 1977 (Center for Disease Control, 1971; 1972; 1974; U.S. Bureau of the Census, 1980).

Measurement of Independent Variables

Wherever possible, race-specific variables are employed in the regressions. Such variables are denoted with an asterisk. Except for the Medicaid and abortion measures, all variables are county-specific. Table 1 contains definitions, means, and standard deviations of the dependent and independent variables in the regressions.

The number of active non-federal physicians per thousand population serves as a general proxy for the price and availability of medical care.[6] The roles of the percentage of births to poverty mothers and the percentage of women of childbearing ages who had at least a high school education were discussed above.

Table 1.—Definitions. Means, and Standard Deviations of Variables[a]

Variable Name	Definition
Neonatal Mortality 1970-72 *	Three-year average neonatal mortality rate for the period 1970-72; deaths of infants less than 28 days old per 1,000 live births (μ_w = 12.729; σ_w = 2.076; μ_b = 21.477; σ_b = 3.988)
PB*	Estimated percentage of births to mothers with family incomes less than the poverty level for the period 1969-71 (μ_w = 21.324; σ_w = 8.388; μ_b = 35.188; σ_b = 11.[illegible]35)
%≥ HS *[b]	Percentage of women aged 15 to 49 who had at least a high school education in 1970 (μ_w = 62.927; σ_w = 7.238; μ_b = 44.096; σ_b = 8.527)
Physicians	Active non-federal physicians per 1,000 population in 1971 (μ_w = 1.505; σ_w = 0.987; μ_b = 1.954; σ_b = 1.220)
MAXPB*	Dichotomous variable that equals one if county is in a state that covers all first-time pregnancies to financially eligible women under Medicaid (MA) multiplied by PB* (μ_w = 7.892; σ_w = 10.850; μ_b = 7.104; σ_b = 12.657)
MUXPB*	Dichotomous variable that equals one if county is in a state that covers first-time pregnancies under Medicaid only if no husband present or if husband present but unemployed and not receiving unemployment compensation (MU) multiplied by PB* (μ_w = 2.810; σ_w = 7.521; μ_b = 3.857; σ_b = 10.212)
MNXPB*	Dichotomous variable that equals one if county is in a state that covers first-time pregnancies under Medicaid only if no husband present (MN) multiplied by PB* (μ_w = 2.284; σ_w = 7.851; μ_b = 7.536; σ_b = 18.185)
MIXPB*	Dichotomous variable that equals one if the county had an M and I project in 1971 (MI) multiplied by PB* (μ_w = 5.339; σ_w = 9.390; μ_b = 16.152; σ_b = 16.577)
PMIBXPB*	Births in M and I projects in 1971 as a percentage of births to women with low income (PMIB) multiplied by PB* (μ_w = 2.174; σ_w = 5.086; μ_b = 8.470; σ_b = 12.670)

Table 1.—(Continued)

Variable Name	Definition
UPXPB*	Percentage of women aged 15 to 44 with family income equal to or less than 150 percent of the poverty level who were served by organized family planning clinics in fiscal 1971 (UP) multiplied by PB* (μ_w = 639.506; σ_w = 521.843; μ_b = 1,435.559; σ_b = 741.955)
Abor. Rate	Three-year average abortion rate for the period 1970-72 of state in which county is located; legal abortions performed on state residents per 1,000 live births to state residents (μ_w = 96.607; σ_w = 80.497; μ_b = 87.156; σ_b = 77.518)
Abor. Reform	Dichotomous variable that equals one if county is in a state that reformed its abortion law by 1970 (μ_w = 0.369; σ_w = 0.483; μ_b = 0.358; σ_b = 0.480)
IMR 66-68	Three-year average infant mortality rate for the period 1966-68, not race or age specific (μ_w = 21.517; σ_w = 3.553; μ_b = 24.380; σ_b = 3.867)

a--Variable names ending in an asterisk(*) indicate variables that are race specific. The symbols μ_w, σ_w, μ_b, and σ_b denote the white mean, the white standard deviation, the black mean, and the black standard deviation, respectively. The white data pertain to 679 counties, while the black data pertain to 359 counties. Means and standard deviations are weighted by the race-specific number of births in 1971.

b--Variable is available only for whites and nonwhites as opposed to whites and blacks.

Note that there are no direct measures of births to poor women, either at the county or at the national level. Therefore, the estimate of the race-specific percentage of births to such women assumes that the race-specific birth rate of poor women does not vary among counties and that the race-specific birth rate of nonpoor women does not vary among counties. Under these conditions, one can compute race-specific birth rates of poor and nonpoor women by regressing the race-specific birth rate (b_j^*, the ratio of births to women ages 15 to 44) on the race-specific fraction of women in poverty (π_j^*):

$$b_j^* = \gamma_0^* + \gamma_1^*\pi_j^*. \qquad (7)$$

The regression intercept (γ_0^*) gives the birth rate of nonpoor women, and the sum of γ_0^* and γ_1^* gives the birth rate of poor women.[7]

After fitting the regressions for whites and blacks, the race-specific percentage of births to poverty women is estimated as

$$PB^* = 100[(\gamma_0^* + \gamma_1^*)\pi_j^*/(\gamma_0^* + \gamma_1\pi_j^*)]. \tag{8}$$

It is clear that PB^* is a monotonically increasing, although nonlinear, function of the fraction of the population in poverty. Therefore, the regression coefficient of PB^* summarizes the impact of poverty on infant mortality. Since poverty and family income are highly correlated, the latter is omitted from the regression.[8]

One may question the assumption that the birth rate of poor women is the same in every county, especially since subsidized family planning services and abortion reform are likely to have substantial impacts on birth rates of poor women. The aim of this paper, however, is to estimate reduced form, as opposed to structural, effects of public policies on infant mortality (see note 5). That is, these policies can lower the observed infant mortality rate by lowering the fraction of births in high-risk categories and by lowering the mortality rate associated with a given risk category. Since the aim is to measure both mechanisms, the estimated percentage of births to low-income women, which varies among counties only because the percentage of the population in poverty varies among counties, is a superior variable to the actual percentage of such births, even if the latter were available.[9]

The policy and program measures contain variables pertaining to Medicaid coverage of prenatal and perinatal care services, maternal and infant care projects, the use of organized family planning clinics by low-income women in childbearing ages, and abortion reform. In the case of prenatal and obstetrical care services, variations among states in the treatment of first-time pregnancies under Medicaid contribute to substantial variations in the percentage of pregnant low-income women whose medical care is financed by Medicaid. In particular, nineteen states cover *no* first-time pregnancies because their aid to families with dependent children (AFDC) programs do not cover "unborn children."[10] The treatment of first-time pregnancies of low-income women under Medicaid by the state in which the county is located is described by three dichotomous variables (MN, MU, MA). MN equals one for counties in states that cover first-time pregnancies only if no husband is present. MU equals one for counties in states that provide coverage if no husband is present or if the husband is present but unemployed and not receiving unemployment insurance. MA equals one for counties in states that provide coverage to all financially eligible women, regardless of the presence or employment status of the husband. The omitted category pertains to counties in states that cover *no* first-time pregnancies because their AFDC programs do not cover unborn children.[11]

The measurement of Medicaid is imperfect because its impact on neonatal mortality depends on the percentage of second- and higher-order births covered and on the quantity and quality of services provided per birth. There are no data on these variables. In preliminary regressions the average Medicaid payment per adult recipient in AFDC families in the state in which the county is located was included as a proxy for the quantity and quality of services. This variable had a positive and statistically insignificant effect on neonatal mortality. Its inclusion had only minor impacts on the coefficients of the other variables.

The presence of a maternal and infant care project in a county in 1971 is denoted by the dichotomous variable MI. A second measure of the impact of these projects is given by the number of births in a maternal and infant care project in 1971 as a percentage of the estimated births to low-income women in 1971 (PMIB). Both variables are employed because this program is relatively small; there were only 53 projects in 1971. The presence of a project and the number of births in it were taken from Bureau of Community Health Services (n.d.).

The impact of variations in Federal, state and local subsidization of family planning services is given by the percentage of women ages 15-44 with family incomes equal to or less than 150 percent of the poverty level who were served by organized family planning clinics in fiscal 1971 (UP). These clinics are organized by hospitals, state and local health departments, Planned Parenthood, and other agencies such as neighborhood health centers. This variable was taken from a survey conducted by the National Center for Health Statistics and by the technical assistance division of Planned Parenthood, then known as the Center for Family Planning Program Development and now known as the Alan Guttmacher Institute (Center for Family Planning Program Development, 1974). It excludes family planning services delivered to low-income women by private physicians.

Dryfoos (1976) reports that almost all clients of family planning clinics use the pill or the IUD. Therefore, the percentage of low-income women who are served by these clinics is positively related to the percentage of low-income women who select the pill or the IUD as contraceptive techniques. There is no information on the use of these techniques by other women at the county or state level, but it is known that women with at least a high school education are more likely to use them. Therefore, part of the observed effect of schooling in the regressions reflects the impact of the diffusion of the pill and the IUD on neonatal mortality.

The Medicaid, maternal and infant care projects, and family planning variables are interacted with the race-specific percentage of births to women in poverty. Since PB^* is a percentage rather than a fraction, the regression coefficients must be multiplied by 100 to obtain the vector of impact parameters (α_1) associated with policies aimed at low-income women [see equations (2), (4), or (5)].

The role of abortion reform is measured by a three-year average of the legal abortion rate for the period 1970–72 in the state in which the county is located. The measure is an average of legal abortions performed on state residents per 1,000 live births to state residents and is derived from information reported by the Center for Disease Control (1971, 1972, 1974). It is assumed that abortions performed in the first half of a given year affect the neonatal mortality rate in the second half of that year. The computation also takes account of the extremely low legal abortion rates before the second half of 1970 in states that reformed their abortion laws in 1970. The assumptions required to estimate the abortion rate are somewhat arbitary.[12] Therefore, in some regressions the rate is replaced by a dichotomous variable that identifies counties in states that reformed their abortion laws by the middle of 1970.

The final variable in the regressions is a three-year average of the infant mortality rate for the years 1966–68 (IMR66-68). Theoretically, this is an important variable to include in the analysis because programs such as maternal and infant care projects and subsidized family planning clinics for low-income women were designed to service target populations with poor health indicators. Consequently, estimates of their impacts are biased toward zero if the initial level of the mortality rate is omitted from the regression. In the case of abortion reform and liberal treatment of first-time pregnancies under Medicaid, the exclusion of the lagged mortality rate might overstate their contributions to reductions in neonatal mortality. This is because most of the states that reformed their abortion laws by 1970 and enacted generous Medicaid programs were liberal states with relatively large welfare programs and probably lower than average infant mortality rates. In general, the use of the lagged rate as an independent variable controls for unmeasured determinants of infant mortality that are correlated with the included variables.

Given lags between the enactment of the programs at issue and their implementation and given lags between implementation and impacts on neonatal mortality, IMR66-68 provides an ideal control for the initial level of the mortality rate. Note also that IMR66-68 is superior to the corresponding race-specific neonatal mortality rate because the overall infant mortality rate was used to identify target populations and identifies the size of welfare programs at least as well as a race- and age-specific rate.[13] Note finally, that, to the extent that the programs at issue had an impact on mortality between 1966 and 1968, their effects are understated. Preliminary regressions (not shown) suggest that this bias is minor. When the lagged mortality rate is excluded from the regressions, the impacts of abortion reform and liberal Medicaid coverage rise in absolute value, while the impacts of family planning and the maternal and infant care program decline in absolute value. This is precisely what one would expect if the regressions with IMR66-68 provide an adequate control for the mortality rate in the period prior to the initial impact date of the programs.

EMPIRICAL RESULTS

Ordinary least squares regressions of white neonatal mortality rates are contained in Panel A of Table 2, and ordinary least squares regressions of black neonatal mortality rate are contained in Panel B of Table 2. For whites, the percentage of births to poor mothers has a positive and statistically significant effect on neonatal mortality, while mother's schooling has an insignificant negative effect. For blacks, the negative schooling effect is significant, but somewhat surprisingly, there is an *inverse* relationship between the percentage of births to poor black mothers and the neonatal mortality rate. For both races, the coefficient of physicians per capita is positive and not significant. Moreover, the infant mortality rate for the period 1966 to 1968 performs well as a control for the neonatal mortality rate prior to the initiation of the programs at issue and for unmeasured determinants of mortality (see regressions A1, A3, B1, and B3).

Because the poverty variable has the "wrong" sign for blacks, it is excluded in regressions A2, A4, B2, and B4. The main impact of this alternative specification is to increase the absolute value of the schooling effect for whites and to reduce it for blacks. Since the coefficients of the policy variables do not change much when PB* is omitted and since the estimation of separate poverty and schooling effects "taxes" the black data, we stress the results contained in regressions B2 and B4 in the rest of this paper. For whites, both estimates with and without PB* are used. In part more specifications are used for whites because trends in white neonatal mortality dominate trends in total neonatal mortality. In particular, white births account for approximately 80 percent of all births at the national level.[14]

Table 2 sheds considerable light on the roles of the policy variables in neonatal mortality outcomes. Nineteen of the twenty-eight policy coefficients have the anticipated negative signs in the four white regressions. All fourteen coefficients have the anticipated negative signs in the two relevant black regressions (B2 and B4). The exceptions in the white regressions pertain to the coefficients of the variables that identify liberal coverage of first-time pregnancies under Medicaid (MAXPB*, MUXPB*, MNXPB*). Given the high degree of intercorrelation among the variables in the regression and the imprecise mea-

Table 2.—Ordinary Least Square Regressions of Neonatal Mortality Rates[a]

Independent Variable	Panel A: White Regressions (A1)	(A2)	(A3)	(A4)	Panel B: Black Regressions (B1)	(B2)	(B3)	(B4)
PB*	.037		.042		-.147		-.133	
	(3.00)		(3.45)		(-4.14)		(-3.83)	
Physicians	.144	.122	.124	.097	.227	.450	.172	.393
	(1.60)	(1.35)	(1.37)	(1.07)	(1.03)	(2.05)	(0.79)	(1.84)
% ≥ HS *	-.015	-.036	-.013	-.037	-.124	-.017	-.137	-.035
	(-1.14)	(-3.13)	(-0.96)	(3.22)	(-2.93)	(-0.49)	(-3.31)	(-1.08)
MAXPB*	.004	.016	-.003	.008	.0004	-.014	-.007	-.010
	(0.39)	(1.83)	(-0.39)	(1.00)	(0.00)	(-0.53)	(-0.31)	(-0.46)
MUXPB*	.003	.010	.004	.012	-.038	-.033	-.041	-.034
	(0.29)	(1.03)	(0.44)	(1.24)	(-1.78)	(-1.51)	(-1.97)	(-1.61)
MNXPB*	-.006	.001	-.002	.007	-.010	-.032	-.010	(-.030)
	(-0.67)	(0.13)	(-0.21)	(0.77)	(-0.75)	(-2.47)	(-0.73)	(-2.32)
MIXPB*	-.005	-.011	-.008	-.017	-.007	-.003	-.007	-.005
	(-0.36)	(-0.87)	(-0.67)	(-1.37)	(-0.30)	(-0.15)	(-0.34)	(-0.20)
PHIBXPB*	-.022	-.020	-.015	-.011	-.033	-.032	-.037	-.036
	(-1.06)	(-0.98)	(-0.76)	(-0.56)	(-1.19)	(-1.13)	(-1.35)	(-1.31)
UPXPB*	-.001	-.0003	-.001	-.0003	-.0003	-.001	-.0001	-.001
	(-2.99)	(-1.94)	(-2.80)	(-1.58)	(-0.86)	(-2.37)	(-0.34)	(-1.76)
Abor. Rate	-.004	-.005			-.009	-.007		
	(-3.25)	(-3.91)			(-2.25)	(-1.58)		
Abor. Reform			-.549	-.592			-1.751	-1.773
			(-3.43)	(-3.69)			(-3.89)	(-3.86)
IMR 66-68	.274	.280	.281	.288	.260	.240	.235	.217
	(12.34)	(12.53)	(12.73)	(13.04)	(3.98)	(3.61)	(3.65)	(3.31)
CONSTANT	7.554	9.400	7.045	9.094	27.184	17.998	27.618	19.238
$\bar{R}^2$	.315	.307	.317	.305	.125	.084	.149	.116
F	29.38	31.05	29.54	30.80	5.64	4.30	6.70	5.68

t-ratios in parentheses. The critical t-ratio at the 5 percent level of significance is 1.64 for a one-tailed test. The eight F-ratios are significant at the 1 percent level.

sures used, the preponderance of negative effects is an important and impressive finding.

In terms of statistical significance, the hypothesis that no member of the set of policy variables has a non-zero effect on neonatal mortality always is rejected at the 1 percent level. With respect to the four specific policies, in general abortion and the use of subsidized family planning services by low-income women have significant impacts, while Medicaid and maternal and infant care projects do not.[15] Specifically, for whites the abortion rate achieves significance at all conventional levels in regressions A1 and A2. A similar comment applies to the dichotomous variable that denotes abortion reform by the middle of 1970 in regressions A3 and A4. For blacks, abortion reform is significant at all levels in regression B4, while the abortion rate is significant at the 6 percent level, but not at the 5 percent level, in regression B2. For whites, the interaction between the percentage of low-income women who use organized family planning clinics and the percentage of births to low-income women (UPXPB*) is significant at the 5 percent level in the first three regressions and at the 6 percent level in the fourth. For blacks, UPXPB* is significant at the 5 percent level in both regressions.

The significance of the abortion rate is notable because this variable is neither race- or county-specific and must be computed subject to a number of somewhat arbitrary assumptions (see note 12). Therefore, it is probably subject to considerable measurement error, which biases its coefficient toward zero. The sizable and significant impacts of the dichotomous abortion reform variable strengthens confidence in the estimated coefficients of the abortion rate and confirm that the effect for blacks is larger in absolute value than that for whites.

To examine the relative contributions of schooling, poverty, and the public programs to the recent U.S. neonatal mortality experience, we apply the coefficients of regressions A1, A2, and B2 to trends in the exogenous variables between 1964 and 1977. The results of estimating the implied changes in neonatal mortality rates due to selected factors for the period 1964–77 and for the subperiods 1964–71 and 1971–77 and given in Table 3.[16] Results for whites and nonwhites are shown because separate time series for blacks are not available.

Since there is little trend in the percentage of families in poverty after 1971 and since the definition of poverty was altered beginning in 1975, the estimates in Table 3 assume no change in poverty or in PB* between 1971 and 1977. In these computations the national levels of the two maternal and infant care project measures are zero in 1964 and do not change from 1971 to 1977. The three Medicaid measures are treated in the same manner. This treatment is justified because there were few of these projects in operation prior to 1967 and almost no trend in the number of projects or the total number of births in projects after 1971 (Bureau of Community Health Services, n.d.). The Medicaid program was not enacted until July 1965, and the rules governing coverage of first-time pregnancies under Medicaid did not vary between 1971 and 1977.

Our treatment of Medicaid is somewhat controversial because the percentage of Medicaid-financed births to poor women and the real quantity of medical services per birth may have risen between 1971 and 1977. Although definitive evidence on these matters is lacking, a number of observations can be made. Much of the observed decline over time in the relationship between income and physician visits, which Davis and Reynolds (1976) show was caused by Medicaid, occurred by 1971. The percentage of the poverty population that received Medicaid benefits rose by only 6 percentage points between 1970 and 1974 (Davis and Reynolds, 1976; Davis and Schoen, 1978). Real Medicaid benefits per recipient show no trend between 1971 and 1977 (Davis and Schoen, 1978). The percentage of black mothers who started their prenatal care in the first trimester of pregnancy rose betwen 1969 and 1975 (Taffel, 1978). Except for the last observation, this evidence justified our treatment of Medicaid. We do, however, examine the sensitivity of the results to an alternative assumption described below.

As shown in Table 3, the actual decline in the white neonatal mortality rate

Table 3.—Contribution of Selected Factors to Reductions in Neonatal Mortality Rates, 1964–1977

	Panel A: Whites						Panel B: Nonwhites		
	1964 - 1977		1964 - 1971		1971 - 1977		1964-1977	1964-1971	1971-1977
Observed reduction in neonatal mortality rate (deaths per thousand live births)	7.5		3.2		4.3		11.8	6.9	4.9
Annually compounded percentage rate of decline in neonatal mortality rate	4.9		3.2		6.9		4.6	4.4	4.9
Contribution of selected factors to observed reduction in neonatal mortality rate	Reg.A1	Reg.A2	Reg.A1	Reg.A2	Reg.A1	Reg.A2	Reg.B2	Reg.B2	Reg.B2
Physicians	a	a	a	a	a	a	-0.2	-0.1	-0.1
Est. poverty births (PB*)	0.4	b	0.4	b	a	c	b	b	b
%≥High School	0.2	0.6	0.1	0.3	0.1	0.3	0.3	0.1	0.2
Abortion rate	1.5	1.7	0.4	0.4	1.1	1.3	2.5	0.6	1.9
UPXPB*	0.6	0.2	0.3	0.1	0.3	0.1	1.4	0.8	0.6
M and I Projects[d]	0.1	0.1	0.1	0.1	a	c	0.3	0.3	c
Medicaid[e]	a	-0.2	a	-0.2	a	c	0.5	0.5	c
Total explained reduction	2.8	2.4	1.3	0.7	1.5	1.7	4.8	2.2	2.6
Percentage explained	37.3	32.0	40.6	24.7	34.9	39.5	40.7	31.9	53.1

a--Less than .1 in absolute value.

b--Variable omitted from regression.

c--No change in variable.

d--Combined contribution of MIXPB* and PMIBXPB*.

e--Combined contribution of MAXPB*, MUXPB*, and MNXPB*.

between 1964 and 1977 was 7.5 deaths per thousand live births. Regression A1, which incorporates separate poverty and schooling effects, "explains" 2.8 of these deaths or 37 percent of the total reduction. Regression A2, which treats the schooling effects as the joint impact of schooling and poverty, acounts for 2.4 deaths or 32 percent of the total reduction. For nonwhites, the neonatal mortality rate fell by 11.8 deaths per thousand live births between 1964 and 1977. Regression B2 predicts a decline of 4.8 deaths or 41 percent of the observed reduction.

A striking message in Table 3 is that the increase in the legal abortion rate is the single most important factor in reductions in both white and nonwhite neonatal mortality rates. Not only does the growth in abortion dominate the other policies, but it also dominates schooling and poverty.[17] For the entire period, the reduction in the white neonatal mortality rate due to abortion ranges from 1.5 to 1.7 deaths per thousand births. The comparable figure for nonwhites is a whopping 2.5 deaths per thousand births. When the two subperiods are examined separately, abortion makes the largest contribution except for nonwhites in the 1964–71 period. Here it ranks second to the impact of the rise in the use of organized family planning services by low-income women. The extremely large expansion in the abortion rate in the latter period (1971–77) provides a cogent explanation of the acceleration in the percentage rates of decline in both race-specific mortality rates and the acceleration in the absolute rate of change for whites.

The increase in the use of organized family planning services by low-income women is the second-most important factor in reductions in nonwhite neonatal mortality for the entire period (1.4 deaths per thousand live births) and the most important factor in 1964–71 (0.8 deaths per thousand live births). For whites, the estimate of the contribution of family planning is sensitive to the inclusion in or exclusion from the regression of the percentage of births to poor women. When PB* is included, it dominates all the other factors except for abortion in the entire period and in the two subperiods. Its effect is weaker when PB* is omitted and is no larger than the impact of maternal and infant care projects in the earlier subperiod.

There is reason to believe that we understate the impact of the use of all family planning services as opposed to organized services by low-income women. This is because our measure excludes services delivered by private physicians. National trends in the percentage of low-income women serviced by private physicians contained in Family Planning Program Development (1974), Dryfoos (1976), and Cutright and Jaffe (1977) suggest that the estimates in Table 3 should be multiplied by a factor of 1.6. This adjustment makes family planning a more important contributor to neonatal death rate reductions than maternal and infant care projects in the computations based on regression A2. It suggests that the predicted reductions of 1.5 nonwhites deaths per thousand births and between 0.2 and 0.6 white deaths per thousand births due to family planning are conservative lower-bound estimates of the true impact.

Maternal and infant care projects have small impacts on white neonatal mortality regardless of the regression specification employed. For nonwhites the effect is somewhat more substantial; it amounts to a decline of 0.3 deaths per thousand births for the years during which the projects were expanding. Of course the impact of these projects over the entire period is dominated by the impacts of abortion reform and family planning in part because there was no change in the size of these projects between 1971 and 1977. But suppose that the absolute increase in the size of these projects had been the same in the second subperiod as it was in the first. Then their predicted impact on the nonwhite neonatal death rate would amount to 0.6

deaths per thousand births, which still is substantially smaller than the abortion and family planning effects.

Medicaid can be dismissed as a cause of the decline in white neonatal mortality; it predicts either no change or an increase in the white death rate. In the case of nonwhites, Medicaid accounts for a reduction of 0.5 deaths per thousand live births. If the somewhat controversial assumption of no change in the program between 1971 and 1977 is relaxed in the same manner as for maternal and infant care projects, we obtain a reduction of 1.0 deaths per thousand births. This is greater than the reduction associated with maternal and infant care projects but smaller than the reductions associated with abortion reform and family planning.

To summarize, these results, when combined with information on the use of the pill and the IUD by women of all income classes, provide a coherent explanation of the U.S. neonatal experience from 1964 to 1977. After a period of relative stability, the neonatal mortality rate began to decline following 1964 as a lagged response to the extremely rapid increase in the percentage of women who used the pill and the IUD between 1961 and 1964.[18] The decline was further fueled by the increase in the percentage of low-income women who used subsidized family planning services between 1965 and 1971 and by the dramatic rise in the legal abortion rate between 1969 and 1971. The acceleration in the rate of decline in the mortality rate between 1971 and 1977 was due primarily to the literal explosion of the abortion rate in that period. These conclusions are subject to the qualification that we have no estimates of the impact of the pill and the IUD other than those inferred through the use of family planning services by low-income women. They also are subject to the qualification that we cannot estimate the contribution of advances in neonatology.

The above findings do not necessarily imply that increases in the quantity of medical care played an unimportant role in the downward trend in neonatal mortality. To be sure, the impacts of Medicaid and maternal and infant care projects are smaller than the impacts of abortion reform and family planning. But as indicated previously, this simply may mean that the quantity of medical care per birth is more responsive to a reduction in the cost of fertility control than to a reduction in the price of care.

These results with respect to the importance of the legalization of abortion in trends in infant mortality differ from those of Bauman and Anderson (1980). Using states of the United States as the units of observation, they find no relationship between changes in the legal abortion rate and changes in the fetal or infant mortality rate. Bauman and Anderson's findings differ from ours for a number of reasons. First, they do not control for other determinants of infant mortality. Second, they do not use race-specific mortality data. Third, they do not examine the impacts of abortion reform on neonatal mortality.

These results are relevant to current U.S. policy debates with respect to the financing of abortions under Medicaid and with respect to attempts by the Right to Life movement to enact a constitutional amendment that would outlaw abortion except when it is necessary to preserve a pregnant women's life. Under the Hyde Amendment, which was in effect from June 1977 until February 1980, Federal funding of abortions under Medicaid was banned except in cases where the woman's life was in danger. During that period, 28 states refused to pay for "medically necessary" abortions. The other 22 states continued to finance most abortions for Medicaid-eligible women by paying the Federal share as well as the state share. As a result, the number of Federally financed abortions declined from approximately 250,000 per year before 1976 to less than 3,000 in 1978 (Trussell et al., 1980). Federal funding of abortions resumed temporarily in February 1980, pending a review by the

U.S. Supreme Court of a ruling by Federal District Judge John F. Dooling Jr. that declared the Hyde Amendment unconstitutional. In June 1980 the Supreme Court reversed Judge Dooling's decision and upheld the constitutionality of the Hyde Amendment.

In spite of the Hyde Amendment, the abortion rate continued to rise between 1977 and 1978. In part, this trend reflects the continued diffusion of a relatively new method of birth control. In part, it reflects a substitution of private for Federal funds by roughly 80 percent of women who would have been eligible for Federal financing in the absence of the amendment (Trussell et al., 1980). One can speculate, however, that the abortion rate would have risen at a more rapid rate between 1977 and 1978 in the absence of the Hyde Amendment. Given the recent Supreme Court ruling, the abortion rate for poor women probably will grow slower than otherwise and might even fall. According to these findings, this will retard the rate of decline in the neonatal mortality rate of the poor.

Taken at face value, the most striking implication of this study pertains to a constitutional ban on abortions. The current U.S. abortion rate is 400 abortions per thousand live births, while the rate in 1969 was 4 abortions per thousand live births. If a ban reduced the rate to its 1969 level, these regressions predict that the nonwhite neonatal mortality rate would rise by approximately 2.8 deaths per thousand live births or by 19 percent above its 1977 level. The white neonatal mortality rate would rise by approximately 1.8 deaths per thousand live births or by 21 percent above its 1977 level. Yet these estimates must be regarded with caution because they assume that all other factors would remain the same if a ban were enacted. In particular, to the extent that abortion is a substitute for more conventional methods of birth control, the use of these methods would not remain the same.

NOTES

[1] The above computations are based on data contained in U.S. Bureau of the Census (1980).

[2] Descriptive and historical information concerning the programs at issue is available in the expanded version of this paper (available on request), and details on abortion reform are provided below. Briefly, Medicaid, enacted in 1965 as Title XIX of the Social Security Act of 1935, is the joint Federal-state program to finance the medical care services of low-income families who are covered by the aid to families with dependent children (AFDC) program. Maternal and infant care projects originated in the 1963 amendment to Title V of the Social Security Act. The amendment provides special grants for projects designed to provide adequate prenatal and obstetrical care to reduce the incidence of mental retardation and other conditions caused by childbearing complications as well as to lower infant and maternal mortality. Federal subsidization of family planning services for low-income women originated in the 1967 amendments to the Social Security Act. Federal efforts in this area were expanded by the Family Planning Services and Population Research Act of 1970 and by the 1972 amendments to the Social Security Act. These subsidies go to family planning clinics organized by hospitals, state and local health departments, Planned Parenthood, and other agencies such as maternal and infant care projects and neighborhood health centers. The diffusion of the pill and the IUD did not result from actions by the Federal government or by states. This development is important for this research, however, because it meant that an extremely effective method of birth control could be offered to low-income women by Federally subsidized family planning clinics.

[3] The indirect costs of obtaining a good are generated by the time spent traveling, waiting, and obtaining information about the good. The terms indirect costs and availability are used here as synonyms.

[4] Eugene Lewit has emphasized to us that theoretically the direction of the effects of abortion on fertility and infant mortality may be indeterminant. For instance, abortion may substitute for other methods of birth control. Moreover, abortion reform may cause the birth rate to rise by increasing the level of sexual activity in general. In spite of these factors, we feel that the hypothesis that abortion reform lowers the infant mortality rates is very plausible. In part this is because we control for the use of family planning services in the regression analysis.

[5] If abortion reform lowers infant mortality solely by reducing the fraction of high-risk births, a measure of reform such as the legal abortion rate should have no impact on infant mortality in a multiple regression that controls for the percentage of low-birth weight births. This is not the case if the

medical care mechanism outlined above also is relevant. Since there is more than one mechanism via which abortion reform and the other policies can affect infant mortality and since the aim of this paper is to estimate reduced form, as opposed to structural, effects, we omit regressors such as the percentage of low-birth weight births. Another reason for adopting this strategy is that some policy variables may have differential and possibly larger impacts on death rates in high-risk categories. Therefore, a study of the mechanisms via which government policies affect infant mortality should pay careful attention to complicated interactions between the policies and the fraction of high-risk births. Such a study is important, but it is beyond the scope of this paper.

[6] In preliminary regressions, the coefficient of the number of hospital beds per capita was insignificant, and its inclusion had only minor impacts on the coefficients of the other independent variables.

[7] The regression equation for whites is

$$b_j^* = .064 + .169\pi_j^*,\ \bar{R}^2 = .269,\ n = 679.$$
$$(t = 15.90)$$

The regression equation for blacks is

$$b_j^* = .095 + .059\pi_j^*,\ \bar{R}^2 = .118,\ n = 359.$$
$$(t = 6.98)$$

In each regression, the dependent variable is a three-year average of the birth rate for the period 1969–71. The regressions are weighted by the square root of the race-specific number of women ages 15–44 in 1970. The poverty variable pertains to the fraction of families below the poverty level, rather than to the fraction of women ages 15–44. The latter variable is not available on a race-specific basis. Another reason for the use of the fraction of families in poverty is that it facilitates the trend analysis in the third section of this paper. The ratios of births per thousand women ages 15–44 implied by the regressions are 233 for poor whites, 64 for nonpoor whites, 154 for poor blacks, and 95 for nonpoor blacks.

[8] In regressions not shown in the third section, median family income was included as an independent variable. Its coefficient was not significant.

[9] From equation (5), the reduced form effect of x_{pj} on d_j is

$$\frac{\partial d_j}{\partial x_{pj}} = (\alpha_0 - \beta_0)\frac{\partial k_j}{\partial x_{pj}} + \alpha_1 k_j + \alpha_1 x_{pj}\frac{\partial k_j}{\partial x_{pj}}.$$

Note that

$$k_{jp}^* = \pi_j^* b_{jp}^* / b_j^*,$$

where b_{jp}^* is the race-specific birth rate of poor women in the j^{th} county. Clearly, this variable is not held constant in our regressions. Note that reduced form effects also could be estimated by expressing k_j as a function of a set of variables, including the policy measures, in equation (5). This results in an extremely complicated functional form. Specifically, it includes the level of each policy measure, the square of that measure, and its product with each of the other measures. Such an equation is not tractable from the standpoint of estimation.

[10] This list of states includes Arizona which has no Medicaid program.

[11] Our information on the treatment of first-time pregnancies under Medicaid by specific state was obtained from Letty Wunglueck of the Health Care Financing Administration. Note that first-time pregnancies of young mothers who are themselves dependents in AFDC families would be covered under Medicaid in spite of the above provisions. States in one of our three categories, however, cover a larger percentage of first-time pregnancies than other states.

[12] Suppose that the neonatal mortality rate (nm_{jt}) and the legal abortion rate (a_{jt}) are measured in half-year intervals. Let the relationship between the two be

$$nm_{jt} = \beta + \delta a_{jt-1}.$$

Aggregate and average this equation over three years (six half years) to obtain

$$\overline{nm}_j = \beta + \delta\bar{a}_j,$$

where

$$\bar{a}_j = \left(\sum_{t=0}^{5} a_{jt-1}\right)/6.$$

The neonatal mortality rates pertain to the period from the first half of 1970 (70-1) to the last half of 1972 (72-2). Therefore ignore the county subscript, and write $\bar{a}$ as

$$\bar{a} = (a69\text{-}2 + a70\text{-}1 + a70\text{-}2 + a71\text{-}1 + a71\text{-}2 + a72\text{-}1)/6.$$

We have data for $a70$-2, $a71$ (the abortion rate during the entire year of 1971), and $a72$. For states that reformed their abortion laws before 1970, we assume that $a69\text{-}2 + a70\text{-}1 = a70\text{-}2$ due to the rapid upward trend in the abortion rate during this period. We also assume that the birth rate in the first half of 1971 equaled the birth rate in the second half of 1971, so that $a71\text{-}1 + a71\text{-}2 = 2a71$. Finally, we assume $a72\text{-}1 = a72$. Hence for these states

$$\bar{a} = (1/3)\,(a70\text{-}2) + (1/3)\,(a71) + (1/6)\,(a72).$$

For states that reformed their laws in the middle of

1970, we assume $a69\text{-}2 = a70\text{-}1 = 0$. Hence, given the other two conditions used above,

$$\bar{a} = (1/6)\,(a70\text{-}2) + (1/3)\,(a71) + (1/6)\,(a72).$$

Since the law for New York State had no residency requirements, states near New York are treated in the same manner as New York in the computation of $\bar{a}$.

[13] Age- and race-specific infant mortality rates for years prior to 1969 are not available on the Area Resource File.

[14] Space limitations prevent the discussion of the effects of poverty, schooling, and physicians in detail and the presentation of additional specifications of the basic regressions. Note the following:

(a) The variables PB* and HSP* are highly correlated for whites ($r = -.6$) and for blacks ($r = -.8$). The insignificant regression coefficients of HSP* in regressions A1 and A3 are due in part to multicollinearity. This phenomenon may also contribute to the black results, although the explanation is somewhat more complicated because the simple correlation between the death rate and PB* is negative.

(b) There are few studies of the race-specific impact of poverty on infant mortality. Using a special sample of births and subsequent infant deaths taken by the National Center for Health Statistics, Gortmaker (1979) reports results similar to ours. White babies are more likely to die in poverty families than in nonpoverty families, but this relationship does not hold for black babies.

(c) The unimportance of physicians per capita in our regressions mirrors findings reported by Brooks (1978) in a study of variations in infant mortality rates among SMSAs. The coefficients of other variables are not sensitive to the exclusion of MD. The MD variable is retained because there is almost no trend in it between 1964 and 1977. Hence its retention does not cloud the forecasts and backcasts that follow.

[15] For Medicaid, we always accept the hypothesis that no member of the set given by MAXPB*, MUXPB*, and MNXPB* has a non-zero coefficient at the 5 percent level. For maternal and infant care projects, we accept the hypothesis that no member of the set given by MIXPB* and PMIBXPB* has a non-zero coefficient in five of six cases. The exception pertains to regression A4.

[16] Note that changes in the lagged mortality rate are not relevant in the forecasts and backcasts in Table 3 because the underlying model is not a dynamic one. Rather, the lagged rate serves as a proxy for the initial level, which does not change by definition. In econometric terminology the model is one with "fixed effects" rather than one with "state dependence."

[17] One might argue that we understate the impacts of schooling and poverty by holding constant an average infant mortality rate centered on the year 1967. Although it is reasonable to suppose that changes in the public policies had no impacts until after 1967, this assumption may not be reasonable in the cases of schooling and poverty. This is because the trends in these variables were continuous from 1960 to 1970. To examine the robustness of our conclusion that abortion dominates schooling and poverty, we reestimated the contributions of these variables from regressions that exclude the lagged mortality rate. Although the contribution of schooling rises relative to the contribution in Table 3, it is still smaller than that of abortion. Note that if county-level fixed effects that lower mortality are positively correlated with schooling, we overstate the schooling coefficient by excluding the lagged mortality rate.

[18] Ryder (1972) reports that in 1961 the percentage of married women under age 35 who used the pill stood at approximately 3 percent. By 1964, it had increased to approximately 16 percent.

ACKNOWLEDGMENTS

Research for this paper was supported by a grant from the Robert Wood Johnson Foundation to the National Bureau of Economic Research. We are indebted to Gary Becker, Willard Cates, Ann Colle, Joy Dryfoos, Linda Edwards, Victor Fuchs, Louis Garrison, Eugene Lewit, Robert Michael, Charlotte Muller, Cathy Schoen, and two anonymous referees for their comments on an earlier draft. In addition we would like to thank Joy Dryfoos, Edward Duffy, Jack Hadley, and Letty Wunglueck for providing us with the data to conduct our research. This is a revision of a paper presented at the World Congress on Health Economics, Leiden University, the Netherlands, September 8-11, 1980. A preliminary version of the paper also was presented at a session sponsored by the American Economic Association and the Health Economics Research Organization at the annual meeting of the Allied Social Science Associations, Atlanta, Georgia, December 28-30, 1979. An expanded version of the paper is available on request. This version contains sources for the extrapolations in Table 3 and a detailed description of the assumptions that underlie these extrapolations.

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DEMOGRAPHY Volume 7, Number 1 February 1970

ESTIMATES OF INDUCED ABORTION IN URBAN NORTH CAROLINA

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Abstract—In 1965, Warner developed an interviewing procedure designed to eliminate evasive answer bias when questions of a sensitive nature are asked. He called the procedure "randomized response." The authors have been studying the technique for several years and, in this paper, are reporting some of the estimates of induced abortion in urban North Carolina using randomized response. Estimates of the proportion of women having an abortion during the past year among women 18–44 years of age are reported. For the study population indices were developed relating induced abortion to total conceptions for whites and nonwhites. The illegal abortion rate per 100 conceptions was estimated to be 14.9 for whites and 32.9 for nonwhites. Estimates of the proportion of women having an abortion during their lifetime among women 18 years old or over are also shown. Among ever married women, the proportion having an abortion during their lifetime declined as education increased. Estimates were high for women with 5 or more pregnancies. Most of the respondents stated that they were satisfied that the randomized response approach would not reveal their personal situation. Furthermore, they did not think their friends would truthfully respond to a *direct* question regarding abortion.

The true incidence of induced abortion in the United States is unknown. A committee appointed by the Conference on Abortion at Arden House, New York, in April, 1955, concluded its report with the observation that a plausible estimate of the frequency of induced abortion in the United States could be as low as 200,000 and as high as 1,200,000 cases per year (Calderone, 1958, p. 180).

There are reasons for the paucity of information on induced abortion in this country. The vital statistics registration laws in most states do not require notification of fetal loss prior to the twentieth week of pregnancy. Induced abortions are generally performed prior to that time, and, therefore, are not reported. Moreover, most of them are induced for nonmedical reasons without legal sanction and would not be reported anyway. Finally, any attempt to obtain data on induced abortion in the usual household interview situation from a random sample of the population seems doomed to failure from the very beginning. Common sense dictates that a prudent woman would not divulge to a stranger the fact that she was party to a crime for which she could be prosecuted.

Warner (1965) recently developed an interviewing procedure that might be used to overcome this difficulty. The technique was designed to eliminate evasive answer bias when questions of a sensitive nature are asked. He called the procedure "randomized response" because the respondent selects a question on a probability basis from two or more questions without revealing to the interviewer which question has been chosen.

The answer is either "Yes" or "No" regardless of the question selected. The reply has no specific meaning for an individual respondent because the interviewer does not know which question has been selected. Pooling the answers for a group of respondents does, however, provide useful information for estimating the proportion of the group with the "sensitive" characteristic. In the event that this characteristic is concerned with illegal behavior or socially deviant acts, such as induced abortion, both the respondent and the interviewer are protected by the nonspecific nature of the reply of the respondent.

Believing that the randomized response technique is potentially of great value in the field of public health, the Department of Biostatistics of the School of Public Health, University of North Carolina, has been studying, field testing, and attempting to evaluate the technique in obtaining data in sensitive areas where the direct question approach would not be practicable. In previous papers (Abul-Ela, Greenberg, and Horvitz, 1967; Greenberg, Abul-Ela, Simmons, and Horvitz, 1969; Horvitz, Shah, and Simmons, 1967) we have attempted to extend the work begun by Warner, and to improve upon the efficiency of the technique itself. To determine the practical value of these improvements, one of the areas which has been under investigation is induced abortion. The purpose of this paper is to publish some of the preliminary findings of abortion reported in central, urban North Carolina.

METHOD

The randomized response device used consisted of a small, transparent, sealed plastic box with two questions printed on the front side of the cover so as to be easily legible to the respondent:

> I was pregnant at some time during the past 12 months and had an abortion which ended the pregnancy.
>
> I was born in the month of April.

The first printed question had a small red ball in front of it while the second question had a blue ball in the same location. Inside the box there were 35 red and 15 blue balls. The respondent was asked to shake the box of balls thoroughly, and to tip the box allowing one of the freely moving balls to appear in a "window" which was clearly visible to the respondent. The color of the ball which appeared in the window determined which of the two questions the respondent was supposed to answer. If a red ball appeared, she answered the abortion question; if a blue ball appeared, she answered the other question. Color blindness is not a problem as it rarely occurs among females. Illiteracy is a problem and respondents should be able to read in order to participate in the most effective manner possible.

The interviewer was some distance away from the respondent and, of course, did not know which question had been selected. The respondent's reply was simply "Yes" or "No" without specifying to which question the answer referred. The box was shaken before returning it to the interviewer to prevent identification.

Rapport between respondent and interviewer was established through a series of questions on reproductive history and ideal family size prior to administration of the randomized response procedure. The technique itself, rationale behind its use, and the necessity for field testing were thoroughly explained to the respondent. In this interview she participated in a trial use of the box with a different set of statements in order to familiarize her with the operation of the device. Also during this period the interviewer read and discussed the following definition with the respondent for the purpose of clarifying the intended use of the word "abortion":

> An abortion is an operation of some kind which a pregnant woman has in order to end her pregnancy and keep from having a baby, or something which she might do to herself to end the pregnancy and keep from having a baby.

This definition includes induced abortion, both illegal and therapeutic, and excludes spontaneous abortions.

A second randomized response device was used in another sample. This device was exactly like the first except that the first question related to abortion during the lifetime:

> At some time during my life I had an abortion which ended the pregnancy.

A probability sample of approximately 1,300 women in the childbearing ages, 18–44, was selected from five metropolitan areas of central North Carolina to field test the first randomized response device and to obtain estimates of the proportion of women having an abortion during the year prior to interview. Population of these cities ranged from 100,000 to 250,000 persons. A probability sample of 1,600 women 18 years old or over was selected from the same metropolitan areas to field test the second device and to obtain estimates of the proportion of women ever having an abortion. The samples were nonoverlapping. Selection of the sample and interviewing were under the direction of the Statistics Research Division of the Research Triangle Institute.

The preliminary estimates reported here assume that the respondents answered truthfully and that the proportion of women in the sample born in April (π_Y) was known in advance. Both of these assumptions will be explored as the study progresses. The proportion of women born in April (.0826) was obtained from a distribution by month of birth of live births occurring to North Carolina residents, 1924–1950. This time span was selected because it includes the year of birth of all respondents 18–44 years of age.

Derivation of the formulae used in calculating maximum likelihood estimates of the proportion of women having an abortion during the past year (π_1), and the proportion of women having an abortion during their lifetime (π_2), and their variances for simple random sampling have been reported elsewhere (Greenberg, Abul-Ela, Simmons, and Horvitz, 1969). They may be summarized as follows:

Assuming π_Y known, the estimate of the proportion of women having an abortion during the past year is

$$\pi_1 \mid \pi_Y = \frac{\lambda - \pi_Y(1 - P)}{P} \qquad (1)$$

$$\text{var}\,(\hat{\pi}_1 \mid \pi_Y) = \frac{\lambda(1 - \lambda)}{nP^2}$$

where

λ = the probability that a "Yes" answer will be reported
$= P\pi_1 + \pi_Y(1 - P)$
P = the probability that the abortion question is selected by the respondent. (This is equivalent to the ratio of red balls to total balls in the plastic box.)
n = sample size

Estimates of $\pi_1|\pi_Y$ and its variance are obtained by substituting the proportion of "Yes" responses ($\hat{\lambda}$) for λ. It will be observed that

$$\text{var}\,(\hat{\pi}_1 \mid \pi_Y) = \frac{\text{var}\,(\hat{\lambda})}{P^2}.$$

Similar formulae are used to estimate the proportion of women having an abortion during their lifetime, $\pi_2 \mid \pi_Y$, and its estimated variance but with a slight modification. For reasons outside the scope of this paper, the sample design for estimating $\pi_2 \mid \pi_Y$ involved two subsamples, with sample sizes n_1 and n_2, proportions of red balls P_1 and P_2, and proportions of "Yes" responses $\hat{\lambda}_1$ and $\hat{\lambda}_2$. A single estimate of $\pi_2 \mid \pi_Y$ can be obtained from each of the two subsamples through the use of formula (1).

Using invariances as the weighting factor for each subsample, the estimate of $\pi_2 \mid \pi_Y$ from the combined subsamples is

$$\hat{\pi}_2 \mid \pi_Y$$

$$= \frac{[\hat{\lambda}_1 - \pi_Y(1-P_1)]A + [\hat{\lambda}_2 - \pi_Y(1-P_2)]B}{AP_1 + BP_2}$$

where

$$A = n_1 P_1 \hat{\lambda}_2 (1 - \hat{\lambda}_2)$$

$$B = n_2 P_2 \hat{\lambda}_1 (1 - \hat{\lambda}_1).$$

For simple random sampling the variance of this combined estimate is one-half the harmonic mean of the two individual variances since the reciprocals of the latter are the weights used in deriving the combined estimate.

In this particular study a stratified random cluster sample was used rather than simple random sampling. Estimates of $\pi_1 \mid \pi_Y$ and $\pi_2 \mid \pi_Y$ were obtained using formula (1) except for the combined estimate of $\pi_2 \mid \pi_Y$, which required special weighting peculiar to the stratified cluster sample design. The variance of $\hat{\lambda}$ was estimated by the approximate variance formula for a combined ratio estimate, since both the number of respondents (denominator) and the number giving a "Yes" response (numerator) were random variables. The variance estimate was computed consistent with the stratified cluster sampling design.

The estimates, $\hat{\pi}_1 \mid \pi_Y$ and $\hat{\pi}_2 \mid \pi_Y$, will hereafter be referred to as $\hat{\pi}_1$ and $\hat{\pi}_2$, respectively.

Shortly before the use of the randomized response procedure, all respondents were asked the following question:

> If an interviewer, like myself, asked one of your friends if she had ever had an abortion, do you think that person would answer truthfully?

The purpose of this question was to elicit the opinion of the respondents concerning the probable validity of the direct approach in obtaining data on induced abortion.

Immediately following administration of the randomized response procedure, the respondents were also asked:

> Do you believe other people will think that there is a trick to the box and that we really can figure out which question they answer?
>
> When you played the "game", were you convinced that I would not know which question you were answering?

The purpose of this set of questions was an attempt to measure our success in convincing the respondents that our motives were legitimate and above reproach, and that there was no veiled intent to trick or mislead.

RESULTS

In an investigation of this kind the degree of success in locating and interviewing those selected for study is of primary importance. There were 3,113 eligible women in the households selected for study in the two samples. Interviews were completed on 2,871 of these women for a response rate of 92.2 percent. Eighty-three women (2.7 percent) refused to be interviewed before the randomized response procedure was even mentioned. The remaining five percent either could not be located or could not participate due to illness or incompetency.

Preliminary estimates of the proportion of women having an abortion during the past year by race, marital status, age, education, and number of pregnancies are shown in Table 1. Estimated variances for both simple random sampling and the particular sampling design

TABLE 1.—Estimates and Variances of the Proportion of Women Having an Abortion During the Past Year ($\hat{\pi}_1$) by Race, Marital Status, Age, Education, and Number of Pregnancies, Urban North Carolina, 1968

Characteristic	Sample size	$\hat{\pi}_1$	Simple random sampling $\sqrt{\text{var } \hat{\pi}_1}$	Stratified cluster sampling $\sqrt{\text{var } \hat{\pi}_1}$
Total.	1251	.0342	.00864	.00996
RACE				
White.	782	.0139	.00932	.00964
Nonwhite	469	.0681	.01687	.02377
MARITAL STATUS				
Never married. . . .	236	.0796	.02530	.03743
Ever married	1015	.0237	.00883	.00939
FOR THE EVER MARRIED:				
AGE (YEARS)				
Under 31	447	.0285	.01363	.01523
31-44.	538	.0203	.01193	.01213
EDUCATION (YRS. COMP.)				
Under 9.	108	.0447	.03150	.04405
9-12	606	.0140	.01036	.01168
13 and over.	301	.0358	.01791	.02316
NUMBER OF PREGNANCIES				
0-4.	830	.0197	.00940	.01005
5 and over	181	.0431	.02426	.02741

Note: Sample comprised of women 18-44 years of age. A comparison of the two variances for the estimates of abortion during the past year indicates that the correct stratified cluster sample √variances are only about 10% higher than those shown for simple random sampling except for nonwhites, never married, and ever married with less than nine years and more than twelve years of schooling. These latter cases are small in number and contain an intra-cluster correlation.

used in this study (stratified cluster sampling) are also given. Estimates of the proportion of women having an abortion during their lifetime are shown in Table 2 separately for each of the two subsamples, and for the combined total. Estimated variances for both simple random sampling and stratified cluster sampling are given for abortion estimates based on the combined subsamples.

In interpreting these estimates, the magnitude of the variances must be considered as well as possible differences in the composition of subsamples with respect to age, race, parity, and other extraneous factors which could influence the estimates.

Abortion during the past year

For the total population, the estimate of the proportion of women having an abortion during the past year was .0342. The estimate was higher for the nonwhite than the white population, .0681 and .0139, respectively. The estimates were also higher for the never married than for the ever married population.

Armijo and Requena (1966) in a 1961 study of abortions in Chile reported the "one-year incidence of induced abortion" in a sample of 3,800 women in the childbearing ages to be .042. This estimate is not precisely comparable with that reported here (.0342). The similarity in magnitude of the two estimates is of some interest, however.

Age-specific estimates for the ever married population show that a slightly larger proportion of those less than 31 years of age had an abortion during the past year than those women 31–44 years of age. Estimates by educational level indicated high rates among women with

TABLE 2.—Estimates and Variances of the Proportion of Women Having an Abortion During Their Lifetime ($\hat{\pi}_2$) by Race, Marital Status, Age, Education, and Number of Pregnancies, Urban North Carolina, 1968

[Variances not otherwise designated were computed in accordance with stratified cluster sampling design]

Characteristic	Combined sample size	Combined subsamples			Subsample 1		Subsample 2	
		$\hat{\pi}_2$	$\sqrt{\mathrm{var}\,\hat{\pi}_2}$	$\sqrt{\mathrm{var}\,\hat{\pi}_2}$*	$\hat{\pi}_2$	$\sqrt{\mathrm{var}\,\hat{\pi}_2}$	$\hat{\pi}_2$	$\sqrt{\mathrm{var}\,\hat{\pi}_2}$
Total . .	1591	.0412	.01020	.01030	.0524	.01184	.0088	.02013
RACE								
White	1087	.0164	.01308	.01114	.0328	.01467	-.0474	.02894
Nonwhite. . .	504	.1028	.01724	.02125	.0967	.02027	.1189	.03276
MARITAL STATUS								
Never married	216	.0410	.02828	.03409	.1079	.03450	-.0960	.03937
Ever married.	1375	.0410	.01136	.01059	.0441	.01299	.0308	.02346
FOR THE EVER MARRIED:								
AGE (YEARS)								
Under 31. . .	315	-.0033	.01809	.02122	.0229	.02284	-.0475	.02964
31-44	371	.0529	.01982	.02057	.0519	.02229	.0566	.04324
45 and over .	656	.0441	.01621	.01480	.0414	.01707	.0687	.05168
EDUCATION (YRS. COMP.)								
Under 9 . . .	318	.0670	.02199	.02452	.0798	.02674	.0404	.03865
9-12.	652	.0252	.01589	.01432	.0295	.01738	.0333	.03911
13 and over .	382	.0226	.01458	.01947	.0396	.01794	-.0105	.02503
NUMBER OF PREGNANCIES								
0-4	1103	.0376	.01332	.01175	.0429	.01498	.0175	.02911
5 and over. .	262	.0547	.02339	.02373	.0428	.02559	.1153	.05761

* Variance computed under assumption of simple random sampling.

Note: Sample comprised of women 18 years old or over. The size of Subsample 2 was approximately one-half that of Subsample 1, and the probability of selecting the abortion question was .30, compared with .70 in Subsample 1. As a result there are some unrealistic estimates of $\hat{\pi}_2$ and high $\sqrt{\mathrm{var}\,\hat{\pi}_2}$ in Subsample 2. It will also be noted that differences in $\sqrt{\mathrm{var}\,\hat{\pi}_2}$ between simple random sampling and stratified cluster sampling are not all in the same direction as was found in Table 1. The sample here was larger and did not contain as much intra-cluster correlation.

less than 9 years of schooling, and among those with 13 or more years of schooling, with a relatively low rate among women with 9–12 years of education. It should be pointed out that the group with less than 9 years of school is small in number with a relatively high variance and is also composed of a greater proportion of nonwhites.

With regard to number of pregnancies, those women with five or more have a higher estimate than those with less than five pregnancies. This is not surprising since number of abortions is thought to be positively correlated with number of pregnancies. It also might be a reflection of the higher proportion of nonwhites in the group with five or more pregnancies or, conversely, the high abortion rate among nonwhites may be a reflection of the higher proportion of women with five or more pregnancies among nonwhites.

Abortion during lifetime

Based upon the combined subsamples, most of the estimates of abortion during the respondents' lifetimes are higher than the corresponding estimates relating to the past year. Exceptions are the never married women and the ever married under 31 years, and those with 13 or more years of school. If one were studying the same sample of women over time, higher rates would be expected over a lifetime than for the past year. The "lifetime" and "past year" samples are not the same group of women, however, and one should use caution in comparing the crude estimates of abortion over the two time periods. In addition to sampling error, the differences observed between the two groups may be due to their differential composition with regard to variables associated with abortion, such as age, race, and number of pregnancies. This is only partially adjusted for by presenting rates specific for a single variable as, for example, age-specific rates.

The estimates based on lifetime were higher for nonwhite than white women, and higher for women with a history of five or more pregnancies than those with less than five. The proportion of women having an abortion during their lifetime was higher for those women 31 years old or over than those younger, probably because the older women had been exposed to the risk longer. As educational level of the respondents increased, the proportion of women having an abortion during their lifetime declined.

Opinions of respondents

In answer to the preliminary question as to whether or not the respondent thought her friends would answer truthfully to a direct question on abortion, 67 percent reported "No", 17 percent reported "Yes", and 16 percent were undecided. This is an important revelation which indicates the necessity for employing the randomized response technique as a means of obtaining data in this sensitive area. Moreover, it implies that many respondents would refuse to take part in a direct question interview and, of those that did agree to participate, not more than about one in six could be expected to report truthfully, and these would not likely include women who had had an abortion.

In answer to the subsequent questions as to whether or not the respondent believed other people would think there was a trick to the box and that we could figure out which question they had answered, 20 percent of the respondents reported "Yes", 60 percent reported "No", and 20 percent of the respondents were still undecided. This shows a remarkable degree of faith in the technique. Fear regarding confidentiality no doubt prompted respondents to report that only 17 percent of their friends would respond truthfully to a direct question on abortion. Nevertheless, 60 percent thought the box with balls gave them the necessary protection from this fear and only 20 percent were in real doubt. When we examined the proportion of respondents who said that they themselves were convinced about the safety of the box in assuring anonymity, the figure rose to 75 percent. We suspect that this increase from 60 to 75 percent represented the respondent's desire to please the interviewer and that there is more meaning in the lower figure with respect to true reporting.

DISCUSSION OF FINDINGS

Conversion of the estimated proportion of women having an induced abortion during the past year to actual numbers of abortions and, finally, to a meaningful index was considered to be highly desirable.

United States

The 1955 Arden House estimate of induced abortions in the United States (200,000–1,200,000 per year) has been

TABLE 3.—Randomized Response Estimates of Induced Abortion in Women 15–44 Years of Age by Race, United States, 1955 and 1967

Race	$\hat{\pi}_1$	1955 Population	1955 Induced abortions	1967 Population	1967 Induced abortions
White.	.0139	30,802,000	428,148	35,178,000	488,974
Nonwhite	.0681	3,976,000	270,766	4,996,000	340,228
Total.	...	...	698,914	...	829,202

widely quoted. For purposes of comparison with this estimate, race-specific randomized response estimates of women having an abortion during the past year were applied to the estimated population of women 15–44 years of age in the United States in 1955 (United States Public Health Service, 1955) and in 1967 (United States Bureau of the Census, 1968) in order to estimate the number of induced abortions during these years. Results are shown in Table 3.

This estimate of 699,000 induced abortions in the United States in 1955 is at the midpoint of the range advanced by the Arden House Conference while the 1967 estimate of 829,000 is at the sixty-three percent point of the range. The apparent increase in our figure for 1967 is, of course, due to the increase in the number of women in the childbearing ages.

Both of these estimates assume that $\hat{\pi}_1$ from our sample of North Carolina urban women 18–44 years of age in 1968 would be applicable to all women in the United States 15–44 years of age in 1955 and 1967. We would expect the abortion rate of urban women to be higher than that of rural women and, therefore, our estimate may be excessive because we have applied the urban rate to rural as well as urban women. This excess is probably offset to some extent, however, since the same rates were applied to women 15–17 years of age as to women 18–44 years of age. A higher proportion of women in this younger age group would be unmarried and our findings show higher rates of abortion for unmarried women. Hence we probably underestimated abortions in the 15-17 age group.

Central urban North Carolina

One of the objectives in this study was to relate *illegal* abortions to total conceptions. To do this, we should like to compute a rate for central urban North Carolina which denotes the probability that a conception will result in an illegal abortion and still another rate which denotes the probability that a conception which survives the first four weeks of pregnancy will result in an illegal abortion.

Race-specific randomized response estimates of women having an abortion during the past year were applied to the 1967 estimated population of women 18–44 years of age in the five cities in North Carolina under investigation. Estimates of the number of induced abortions that year were thus obtained and are shown in Table 4.

This estimate of 4,942 induced abortions in central urban North Carolina in 1967 includes therapeutic abortions.

TABLE 4.—Randomized Response Estimates of Induced Abortion in Women 18–44 Years of Age by Race, Central Urban North Carolina, 1967

Race	$\hat{\pi}_1$	Population	Induced abortions
White. .	.0139	140,000	1,946
Nonwhite	.0681	44,000	2,996
Total.	...	...	4,942

Gold, Erhardt, Jacobziner, and Nelson (1965, p. 966), reporting on data from New York City, 1960–1962, estimated the ratio of therapeutic abortions per 1,000 live births as 2.6 for white women and 0.5 for nonwhite women. Assuming that rates of this magnitude apply to North Carolina, the number of therapeutic abortions in the study population would be 20 for whites, and 2 for nonwhites. These estimated therapeutic abortions were deducted from the overall estimates of induced abortion shown in Table 4. The remainder were considered to be illegal abortions and numbered 1,926 for whites and 2,994 for nonwhites. These estimates will constitute the numerators for the rates referred to above.

In order to determine total conceptions in the study population during a given year, information must be obtained on live births, induced abortions, and other fetal losses, including spontaneous abortions. The number of live births occurring in the study population was obtained from the North Carolina State Board of Health and illegal abortions were estimated as previously described. Erhardt (1963, p. 1351) studied pregnancy losses in patients of a sample of physicians in New York City and estimated total fetal loss among private patients as 295 per 1,000 conceptions. Presumably this estimate does not include illegal abortions. By applying the New York rate to North Carolina data, total conceptions excluding illegal abortions, denoted by X, are computed as

$$\begin{aligned} X &= \text{live births} + .295X \\ &= \text{live births}/.705 = 1.418 \text{ live births} \end{aligned}$$

Total conceptions are determined simply by adding illegal abortions to X. The illegal abortion rate per 100 conceptions could be written

$$\frac{\text{Estimated illegal abortions}}{1.418\ (\text{live births}) + \text{estimated illegal abortions}} \times 100 \qquad (2)$$

Using formula (2), the illegal abortion rate per 100 conceptions in central urban North Carolina by race is estimated as

White:

$$\frac{1926}{1.418\ (7783) + 1926} \times 100 = 14.9$$

Nonwhite:

$$\frac{2994}{1.418\ (4297) + 2994} \times 100 = 32.9$$

Total:

$$\frac{4920}{1.418\ (12080) + 4920} \times 100 = 22.3$$

Thus we estimate that approximately one conception out of seven among whites results in an illegal abortion, and almost one conception out of three among nonwhites ends in illegal abortion.

Armijo and Requena (1966) found that 23 percent of pregnancies over a three year period of time in their sample of 3,800 women were terminated by induced abortion. The comparable figure in the present study was 22.4 percent which included both therapeutic and illegal abortions during the past year.

In computing total conceptions for the indices shown above, we used the same fetal loss rate for both races. Erhardt (Calderone, 1958, p. 74) in a study based on registration data in New York City reported that spontaneous abortions occur about twice as frequently among nonwhites as among whites. If this is true, the abortion rate for nonwhites would be slightly overestimated, and the white rate underestimated.

Considering the sequence of events which must transpire prior to obtaining an illegal abortion, it seems logical to conclude that only a relatively insignificant number of illegal abortions occur in the United States under four weeks gestation. An index relating illegal abortions to conceptions surviving the first four weeks of gestation would be more specific and, perhaps, more meaningful than one based on total conceptions. This is because the denominator would be free of a large number of spontaneous abortions and would more accurately reflect those pregnancies subject to the risk of illegal abortion. With this in mind, rates based on conceptions surviving the first four weeks of gestation have been calculated.

Erhardt (1963, p. 1351) estimated that 888 per 1,000 conceptions survive the first four weeks of gestation. Applying this factor to our previous estimate of total conceptions excluding illegal abortions (X), the number of conceptions excluding illegal abortions which survive the first four weeks of gestation, denoted by Y, is

$$Y = .888\,X = .888\ (\text{live births})/.705 = 1.260\ \text{live births}$$

Total conceptions surviving the first four weeks of gestation would be determined simply by adding illegal abortions to Y. The illegal abortion rate per 100 conceptions surviving the first four weeks of gestation would be

$$\frac{\text{Estimated illegal abortions}}{1.260\ (\text{live births}) + \text{estimated illegal abortions}} \times 100 \qquad (3)$$

Using formula (3), the illegal abortion rate per 100 conceptions surviving the first four weeks of gestation is estimated as follows for central urban North Carolina by race:

White:

$$\frac{1926}{1.260\ (7783) + 1926} \times 100 = 16.4$$

Nonwhite:

$$\frac{2994}{1.260\ (4297) + 2994} \times 100 = 35.6$$

Total:

$$\frac{4920}{1.260\ (12080) + 4920} \times 100 = 24.4$$

The abortion rates based on conceptions surviving the first four weeks of gestation are observed to be approximately ten percent greater than when based on total conceptions.

SUMMARY

Preliminary randomized response estimates of induced abortion in central urban North Carolina during the past year, and during the lifetime have been presented, along with variances of these estimates. Attitudes of respondents to a direct question approach on abortion, and attitudes toward the randomized response approach were also reported.

Estimates of the proportion of women having an abortion during the past year among women 18–44 years of age were .0139 for the white population in the sample and .0681 for the nonwhite population. Estimates were higher for the never married than the ever married. When the ever married population was subdivided by age, estimates in the group under 31 were slightly higher than those found among the older women 31–44 years of age. With respect to education of the ever married, estimates were high for those with less than 9 years of schooling, and with 13 or more years. The ever married group with less than 5 total pregnancies had a lower estimate than those with 5 or more pregnancies.

The race-specific estimates of women having an induced abortion in the past year were applied to the female population 15–44 in the United States in 1955 and 1967 for the purpose of approximating the number of induced abortions in those years. The resulting estimates, 699,000 in 1955 and 829,000 in 1967, were compared with the Arden House Conference estimate of 1955. Assumptions underlying these estimates and limitations of data were discussed.

For the study population in central urban North Carolina, indices were developed relating induced abortions to total conceptions for whites and nonwhites. The illegal abortion rate per 100 conceptions was estimated to be 14.9 for whites, 32.9 for nonwhites, and 22.3 for both racial groups combined.

Similar estimates relating induced abortions to conceptions surviving the first four weeks of gestation were computed. The illegal abortion rate per 100 conceptions surviving this period was estimated to be 16.4 for whites, 35.6 for nonwhites, and 24.4 for both racial groups combined.

Assumptions inherent in these two sets of rates were discussed, as well as potential errors and limitations of the data.

Estimates of the proportion of women having an abortion during their lifetime among women 18 years old or over were generally higher than those found in the sample relating to the past year. In the ever married group, estimates were higher for women 31 years old or over than for younger women. As education increased, the proportion of women having an abortion during their lifetime declined.

Most of the respondents reported that they were satisfied that the randomized response approach was legitimate and that it would not reveal their personal situation. On the other hand, most of them reported that they did not think people would truthfully respond to a direct question regarding abortion.

Results from this study clearly indicate that the randomized response procedure is a worthwhile tool in the hands of the survey designer.

ACKNOWLEDGMENTS

This research was supported under Research Grants HD 03461-01 and HD 03441-01 from the National Institute of Child Health and Human Development.

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From Consensus to Conflict: Politicizing the Abortion Issue

By Dr. Byron W. Daynes

[Editor's Note: The author of this article, Dr. Byron W. Daynes, is an associate professor and chairman of the political science department at DePauw. He co-authored, with Raymond Tatalovich of Loyola University of Chicago, the book The Politics of Abortion: A Study of Community Conflict in Public Policymaking *(NY: Praeger, 1981). Dr. Daynes holds the B.S. and M.S. degrees from Brigham Young University and the Ph.D. from the University of Chicago.]*

"This'll Kill You!" ... "The Death Peddlers!" ... "Keep Your Laws and Your Morality Off My Body!"

These are the terms and words often used today to discuss abortion. Pro-life opponents of abortion focus our attention on the necessity to save the lives of the unborn, while pro-choice proponents favoring abortion choose to direct our [illegible]s to the fetus as a "non-person" and on the need to protect women's rights. Use of distinct language and concern over separate aspects of human life make it difficult for these two sides to communicate. Furthermore, abortion engenders a great deal of feeling on both sides of the issue. As Time magazine announced in its April 6, 1981 cover story on abortion: "It is, without question, the most emotional issue of politics and morality that faces the nation today."

Yet, for more than seven years, public opinion has been almost evenly divided over the issue. In 1974 the Gallup polling group asked the following question—The U.S. Supreme Court has ruled that a woman may go to a doctor to end pregnancy at any time during the first three months of pregnancy. Do you favor or oppose this ruling? Forty-seven percent of the respondents indicated that they favored the ruling while 44% opposed it, and nine percent had no opinion. In 1981 the response to the same question was almost identical with 45% of the public favoring the Supreme Court's decision and 46% opposing it with nine percent without an opinion.

Although it appears that in seven years little has happened to change the public's mind on abortion, such a conclusion masks the shifts in power that have taken place and the intensity of the conflict that has grown during this period.

The contention and conflict one observes today between those supporting abortion and those opposing it has not always been present. After all, abortion has been a practice followed by many in society for decades. Why in the last decade did the debate become so virulent? During the 1960's, for example, the question of abortion was contained within a medical framework: abortion was a "medical" question, not a moral or political one. Therapeutic abortion was a procedure seen to relieve the pregnant woman of physical and mental anguish. From 1966 to 1972 abortion reformers in some 14 states adopted abortion laws reforming the nineteenth century anti-abortion laws that had so long prevailed in the states. Most of these reforms were structured after the pattern set by the Model Penal Code written by the American Law Institute. This model code allowed abortion whenever the mother's mental or physical condition was threatened or when the woman had become pregnant as a result of rape.

In 1970 another four states—New York, Hawaii, Washington, and Alaska—went even further and allowed abortion "on demand," which did not require that the mother's health be in question. In most of the 14 states instituting "therapeutic" abortion reforms and those instituting abortion on demand, there was little resulting conflict. Arguments for such revision seemed acceptable among a majority of the public. In addition, opposition to abortion reform was not well organized even in those four states providing for abortion on demand. Except for New York, Catholics, who provided the heart of the opposition to abortion, were in a decided minority in all 17 other states. Physicians as well as citizen reformers in these states became the primary elements of a consensus of the 1960's in support of therapeutic abortion.

But this consensus began to dissolve once abortion supporters became restive and turned to the courts to "repeal" anti-abortion laws rather than being satisfied to reform these laws. The state courts, however, were inconsistent in their decisions on repeal. For example, by the beginning of the 1970's, anti-abortion laws in 10 states had been declared unconstitutional, but those in seven others had been declared constitutional. Such inconsistency seemed to depend on the vagueness of the statutes in question and whether there were compelling reasons to regulate abortions.

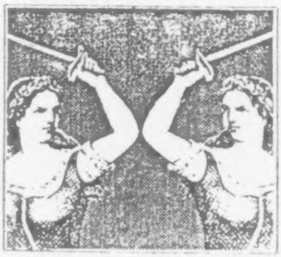
Some state courts even gave rights to the unborn. Court decisions in Rhode Island in 1938 and in New York in 1941, for example, had given the unborn some of the same rights possessed by all citizens. They could receive compensation for any injury incurred while still in the womb, as well as seek damages even if stillborn.

By 1973 the Supreme Court had precedence on both sides of the abortion question. Rather than supporting the New York Court of Appeals opinion in **Byrn v. New York City Health and Hospital Corp.** (1972), which declared the unborn to be "living human beings," the Supreme Court focused on the concept of the woman's privacy in its landmark 1973 decision in **Roe v. Wade**. The Supreme Court applied the concept of freedom of choice for pregnant, unmarried Jane Roe, refusing any longer to recognize the rights of the unborn.

In the **Wade** decision the Court divided the pregnancy into three parts. In the first trimester it was left to the woman and her physician to determine whether an abortion was appropriate. During the second and third trimesters, state interests might overrule individual choice regulating or proscribing abortions. Yet it was only the first trimester that was important, since if the woman chose abortion, state interests would be of no consequence. And so while the decision appears to balance the interests of a woman's privacy against state interests to protect life, the Court in effect only supports the interests of the pregnant woman to choose whether or not to have an abortion. Such an uncompromising decision made it impossible for pro-life advocates to accept the decision.

A second concern on the part of those opposing abortion was the Supreme Court's refusal to deal with the question of "when life begins." The Court felt that since the fields of medicine, philosophy and theology could not arrive at a consensus about the beginnings of life, it would be presumptive of the Court to think it could resolve the question. And yet the Court, in making its decision on abortion, acted on its own unstated presumption of when life begins—at birth—a position the Court suggested most American Protestants and Jews adhered to.

For the opponents of abortion, it was this question of when life begins that had to be decided before the question on abortion could be answered. They felt that a direct response from the Court was necessary in order for the public to know whether the Supreme Court was supporting the killing of human beings or protecting the sanctity of a woman's privacy. Though it did not specifically take a position on this issue of when life begins, the Court's answer to opponents of abortion was, nevertheless, clear.



As a result of **Roe v. Wade** the Court not only legalized abortion on demand—the most extreme position taken by abortion proponents—but it also dissolved the fragile consensus in support of therapeutic abortion. Compromise between opponents and supporters of abortion now seemed remote. Stated in the stark terms of **Wade**, there was little room for negotiation. The terms of the debate were now changed from a medical question to a civil rights and moral question with "right" and "wrong" answers. The controversy was now expanded in scope from the elite conflict of the 1960's to one of mass-based participation and high visibility, involving political decision-makers, interest groups, churches, and the public. The two sides became polarized with each side using personal confrontation rather than reasoned dialogue used in the 1960's. The controversy became highly emotional and at times virulent with pro-life extremists resorting to harrassment of clinic patients and the firebombing of abortion clinics in a number of cities. Mass marches, lobbying and targeting of political candidates for defeat became common techniques used by both sides after 1973.

Because **Roe v. Wade** ignored public opinion and undercut state consensus as well as creating unnecessary tensions between Court and Congress, the Court felt the pressures of its own decision. Since 1973 the Supreme Court has even relinquished some ground on the abortion question. In 1977, for example, the state seemed to win back some control over abortion from the federal government in the cases of **Beal v. Doe, Maher v. Roe**, and **Poelker v. Doe**. In the **Beal** case the Court indicated that states do not have to fund non-therapeutic abortion from Medicaid funds; and in the **Maher** case the Court granted that it is not a violation of constitutional protection if a state chooses not to fund non-therapeutic abortions even if it does pay for childbirth. In the **Poelker** case the Court allowed the state to provide services for childbirth without having to provide similar services for non-therapeutic abortions.

While the Court has not come close to overturning **Roe v. Wade**, it has allowed in the 1980 case of **Harris v. McRae** for other institutions to have input into abortion decisions. Congress, in this case, was allowed to continue its control over the public funding of abortions. Hence, some modifications in the Court's firm stand in **Wade** have taken place.

Because the pro-life position on abortion was rejected by the Court in 1973, however, advocates of this position have turned their attention to the Executive and Congress. And they have been successful in their appeals, since pro-life supporters now predominate in Congress as well as in the Presidency.

Presidents have been, however, of little help to those involved with the issue. Few have even taken a stand on the issue unless it has been forced upon them. Among the contemporary Presidents who have taken a firm stand, both Richard Nixon and Ronald Reagan strongly opposed abortion. In the 1980 Presidential campaign, for example, Ronald Reagan referred to the **Wade** decision as "an abuse of power as bad as the transgressions of Watergate and the bribery on Capitol Hill."

While the economic and foreign policy issues have absorbed the Reagan Administration's first years in office, there are predictions that conservatives and fundamentalist Christians will pressure the President to encourage more aggressively anti-abortion legislation in the coming year. If so, his leadership could help further modify the position of legalized abortion.

But it has been from Congress that we have had the approaches to abortion that might recreate the political milieu of consensus in the 1980's. Unlike judicial decision-making, the legislative process depends on negotiation, bargaining and compromise to settle disputes. Both sides of a conflict do not always win but neither do they always lose. Economic issues for Congress are always easier to resolve in this way than are moral issues like abortion. Yet, several interesting approaches currently before Congress may hold promise of resolution even for this controversial issue.

One approach that Congress feels most comfortable with is tied closely to its own control over public funding. The Hyde amendment, a statutory amendment that is yearly attached to public funding proposals, has regularly restricted funding of Medicaid abortions since 1976. This approach has been fairly effective in reducing the number of funded abortions. Once the Hyde amendment went into effect in August, 1977, for example, Medicaid abortions decreased from 295,000 during the first year of the Hyde amendment to 2,400 in 1979. The Hyde amendment has given pro-life spokesmen some hope of at least restricting some abortions to that segment of society that has resorted to abortion in the greatest numbers. It has also allowed Congress and the states to reassert their own priorities and control over abortion policy.

In 1980 supporters of abortion challenged the constitutionality of the Hyde amendment in Court, charging that it was discriminatory against welfare mothers. But in the 1980 case of **Harris v. McRae** the Supreme Court supported Congress' right to restrict abortions through its Constitutional right to control public funding.

A second approach Congress has used to resolve the abortion conflict has been to do that which the Court failed to do in **Roe v. Wade**, namely, to define when life begins. Anti-abortion supporters reasoned that such a definition could act to "circumvent" the **Roe v. Wade** decision since the Supreme Court failed to offer such definition. If Congress could define life as beginning at conception, then rights would be given to the unborn through the Fourteenth Amendment, and the right of the woman to choose an abortion during the first trimester would again become unconstitutional.

The current bill before Congress, S 2148, would both define life as well as make the Hyde amendment a permanent law so that it would not need yearly passage by the Congress. The bill would also prevent federal trial courts and appellate courts from handling state anti-abortion appeals. Cases would go through the state court system and could then be appealed directly to the Supreme Court. Supporters feel that the states in this way might more easily control abortion policy. The all-important 75-member Congressional pro-life caucus has already endorsed the Hyde-Helms bill. The bill is to be reported from committee to the floor of Congress during the fall of 1982.

While an interesting approach to the abortion dilemma, the Hyde-Helms bill does not promise the needed consensus for a long-term solution to abortion. One of the pending Constitutional amendments outlawing abortion that Congress is now considering, however, may allow for such a consensus. This amendment, sponsored by Senator Orrin G. Hatch (R-Utah), would allow either Congress or the individual states to adopt laws which would prohibit abortions. The amendment reads in part:

> The right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions. Provided, That a law of a State more restrictive than the law of Congress shall govern.

While the amendment is written in terms more appealing to pro-life supporters, it nevertheless holds promise to both sides of the debate. With the adoption of this amendment, for example, abortion would no longer be national policy. No longer would it be thrust into the national political arena as a center of conflict. Nor would the Courts, in their uncompromising style, be the decision-making body dealing with the questions of abortion. The primary unit of decision-making would no longer be national, but state. The Supreme Court has found in the past that reducing the decision-making constituency from national to state has the advantage of multiple resolutions to a difficult dilemma.

When the court found it could not devise acceptable national standards for obscenity, for example, it followed this procedure allowing local community standards to prevail. And while this has not been an ideal solution to the problem, it has been a workable solution. The Hatch amendment would return the abortion decision to the constituencies where it resided prior to **Roe v. Wade**. In states like New York, Alaska, Hawaii, or Washington, where abortion on demand was the policy, [illegible] states like Texas that supported anti-abortion laws, such policy would also be allowed again. And in the majority of the states where a consensus in support of therapeutic abortion seemed to prevail, they too would be able to reinstate this policy.

While such an amendment will not be totally satisfying to those who believe abortion means the taking of human life or to those who feel that to tamper with the right of abortion is stripping a woman of her individual rights, it may be the only possible political solution to diffuse the conflict. Recognizing this, Cardinal Terence Cook of New York and Archbishop John Roach of St. Paul-Minneapolis, president of the National Conference of Catholic Bishops, have testified before Congress in support of this amendment. In addition, the Governing Board of the National Right-to-Life Committee has also given support to the amendment, even though 11 state Right-to-Life leaders have asked for the resignation of Dr. Jack Willke, president of the national organization, because of this support.

As Senator Hatch indicated of this amendment, it does not mandate anything. It does not take up the concerns of when life begins, nor does it consider the exceptions to abortion. It does not concern itself with any particular type of contraception or support any type of criminal sanctions against those choosing abortion. All the Hatch amendment does, he suggests, is to "deconstitutionalize" abortion—a move that seems the first step to resolution. It would be up to Congress or the states to determine abortion policy—not the courts.

This amendment does not attract the extremists from either side of the debate, but it would give the pro-life and pro-choice moderates cause to consider whether this is not all the political system can do to mitigate the tension engendered by this issue. As long as the public assesses the controversy in terms of "morality" or "truth," a middle ground consensus important to diffusing conflict in a democracy is not possible. The political system simply cannot deal with questions so phrased. If the issue cannot be resolved in terms of a bargain or a compromise, no political resolution is possible. The manner in which the Supreme Court phrased the question in **Roe v. Wade** did not allow for resolution. The Hatch amendment, on the other hand, seems to offer both sides the chance to seek resolution through having smaller and perhaps more contained and homogeneous units deal with this question. Abortion then becomes an issue that can more readily be resolved in the political arena. □

FROM ABORTION REFORM TO ABORTION REPEAL

The trauma of abortion politics

RAYMOND TATALOVICH
& BYRON W. DAYNES

FOR ALMOST two decades, abortion has persisted on the political agenda. The Supreme Court's landmark 1973 rulings in *Roe v. Wade* and *Doe v. Bolton* did not resolve this dispute but rather aggravated it to the point where the very fabric of democratic politics is threatened. In its present form, abortion joins such political issues as ~~Abolition~~, school desegregation, Prohibition, and Bible-reading in the schools. As with these earlier controversies, abortion is not an economic but a "lifestyle" issue. It does not involve the immediate self-interest of the parties on either side of the dispute, nor does it allocate tangible resources among various groups in the population. The debate over abortion today is a contest between divergent values, and the dispute is so combative that the antagonists cannot even "agree to disagree." They fail to acknowledge a common ground for argument, which is why a settlement of the abortion dispute is so distant.

The test abortion now poses for the stability of our democratic system need never have come to pass; the entire question did not begin with such ominous overtones. In fact, there have been *two* abortion issues—one that began in the 1960s and one that emerged during the 1970s. Only by fully understanding this difference can citizens appreciate how the abortion controversy has been transformed and intensified and what steps may be required to resolve it successfully. This transformation in abortion politics was precipitated by *Wade*, and involved changes in the nature of the issue and in the scope of political conflict.

MOST OBSERVERS would not date the beginnings of this controversy earlier than 1959, the year when the American Law Institute recommended "therapeutic" abortion in cases where the mother's or child's physical or mental health was endangered or in cases of rape. Its Model Penal Code had little immediate effect, but eventually a "reform" movement coalesced around those objectives. The problem for reformers during the 1960s was to get exposure for an issue long ignored by the body politic. This was provided by the sensational publicity surrounding Sherri Finkbine's effort to obtain a legal abortion and the birth-defect tragedies caused by the drug thalidomide as well as a subsequent outbreak of German measles. Ultimately, fourteen states reformed their abortion laws during 1966-1972; in 1970, moreover, New York, Alaska, Hawaii, and Washington "repealed" their statutes to permit abortion as an elective procedure. These eighteen states are significant beyond their numbers since they represented two-fifths of the nation's population in 1970.

The gains made by reformers during this period were impressive. In most instances therapeutic abortion was enacted without much conflict. The arguments for reform seemed compelling, and the forces in opposition were not well organized. Catholics, in particular, were a decided minority in all the states adopting abortion reform except New York. What the 1960s showed was the gradual building of a consensus behind abortion *reform*. Conflict was also minimized because the terms of the debate were narrowed to a specific issue, "therapeutic" abortion, which seemed to have no major ramifications for society. And by following the guidelines of the American Law Institute (ALI), pro-abortion activists in virtually every state were bound by the same assumptions, made similar arguments, and pursued common objectives.

Both proponents and opponents of abortion agreed that ALI reforms permitted abortions to only a limited number of women. Some pro-abortionists were concerned about this, arguing that many deserving women in depressed socioeconomic conditions would not be aided by reformed statutes, but others used this fact to assure the public that liberalization would have only limited impact on the country. While anti-abortionists raised the specter of mercy killing and infanticide

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resulting from this deterioration in public morals, the mass media tended to address the abortion question from a short-term, problem-solving perspective. That a moral position against abortion existed was duly noted, but opinion-making elites tended not to take it seriously. Instead, the controversy was defined as a medical problem rather than a moral issue. Reformers appealed to state legislatures to permit physicians to practice good medicine; they appeared to be calling for almost a technical revision in the criminal code to reflect contemporary medical standards. To the extent that any issue is defined as purely a technical problem, the citizenry tends to defer to the judgment of those experts directly involved. And this quality affected the abortion debate in the 1960s; the esteem enjoyed by the medical profession facilitated the cause of abortion reform. Numerous opinion polls were taken of physicians during this period, and all showed the profession to be solidly behind therapeutic abortion.

Nor was the call for abortion reform a radical alteration in public policy. There was a tradition behind it. All states operating under nineteenth century anti-abortion laws had permitted therapeutic abortion in cases where the mother's life was endangered. A few states, moreover, allowed abortion also when the mother's health was threatened. In this light, therefore, the reformers were simply asking for added therapeutic exceptions to the law. And this argument seemed modest compared to the opposition's assertion that any abortion, including those now legal, was immoral and should be prohibited. Pro-abortionists were offering the public an argument for incremental changes in existing abortion law, whereas the opposition appeared more extreme in its position.

Another characteristic of the 1960s was the fact that the pro-abortion effort was "elitist" in nature. In each state that enacted abortion reform, a small number of activists working through ad hoc organizations were able to place this issue on the formal agenda of government. These activists were also able to build broad-based coalitions with established health-care organizations, professional associations, and civic groups. And although certain pro-abortion militants occasionally used direct action to dramatize their cause, the thrust of abortion reform was to effectively utilize conventional lobbying techniques.

The public was not involved in the reform movement beyond articulating its approval for therapeutic abortion in public opinion surveys. During the 1960s as many as eighty percent of Americans favored abortion reform. And support came from both Catholics and Protestants, though Catholics tended not to support abortion at the same level as did Protestants. Nevertheless, given the legitimacy of reform in public opinion, it is highly doubtful that the kinds of arguments made by abortion opponents could have engendered a widespread public reaction against the limited goals being advanced by the abortion reformers.

Transition in Abortion Politics

FROM 1969 UNTIL 1973 abortion politics established the pattern which would dominate the post-*Wade* era. This pattern was shaped by three interrelated developments.

First, pro-abortionists abandoned therapeutic reform in favor of outright repeal as their fundamental objective. The National Association for the Repeal of Abortion Laws (NARAL) was formed in 1969, and numerous feminist, health care, and religious groups endorsed abortion "on demand." Among such organizations were the American Civil Liberties Union, National Organization of Women, Physicians Forum, American Public Health Association, United Church of Christ, Presbyterian Church in the United States, and the National Council of Jewish Women.

Second, the opposition to abortion appears to have stiffened during this time, and the emerging right-to-life movement did not moderate the debate by calling for a return to therapeutic abortion while opposing repeal. It sharpened the conflict by opposing *any* changes in the legal status quo. Given this increased hostility between the combatants, it became more difficult to fashion a meaningful compromise on this issue. During the years 1971-1973 only Florida enacted therapeutic reforms. At this time, moreover, the abortion activists had planned a Midwest offensive to push for abortion repeal; their defeats in Iowa, Minnesota, and Michigan showed the tenacity of anti-abortion forces. In the case of Michigan, as well as in North Dakota in 1972, the opposition rallied public opinion to defeat referenda proposing liberalized abortion. In Pennsylvania, after a vicious confrontation between the disputants, the state legislature enacted a very restrictive law permitting abortion only when certified by three physicians. And in New York, anti-abortionists were able to pressure the legislature to rescind that state's two-year-old "repeal" law, only to have that legislation vetoed by Governor Rockefeller.

Third, the proponents of abortion shifted their attention to the judiciary rather than expend limited resources on the slower process of lobbying state legislatures. Before 1969 there had been very little judicial involvement in the abortion issue. That year California's pre-1967 law was invalidated by the State Supreme Court, and the District of Columbia abortion statute was declared unconstitutional by a federal District Court. In the fall of 1970 there were five abortion cases pending before the Supreme Court, more than twenty in lower federal courts, and many more in the state courts of eleven states. By the time of the *Wade* decision, the Supreme Court could cite precedent based upon seventeen judicial decisions. Anti-abortion laws in Connecticut, Georgia, Texas, North Dakota, Illinois, Kansas, New Jersey, Wisconsin, California, and Florida had all been declared invalid whereas others in Kansas, Louisiana, North Carolina, Ohio, Utah, Indiana, Mississippi, and South Dakota had been upheld. In this body of case law, the advocates of legalized abortion based their challenges on the following grounds: (1) the rights of the woman, (2) the vagueness of the statute, (3) the issue of privacy, and (4) equal protection. Where the courts upheld existing anti-abortion laws, they tended to accept the opposition's view that the state had a "compelling" interest in regulating abortions and in protecting fetal life.

Various state court opinions, moreover, suggested that the fetus had some legal rights. Decisions in Rhode Island in 1938 and in New York in 1941, for example, said that the unborn child possessed the rights of a human being. Established tort law recognized that the unborn child had the right to receive compensation for injury and to be represented in court as a "person" who could sue for damages, even if stillborn. As recently as 1967, in Massachusetts, a state court declared in the case of *Torigian v. Watertown News Co.* that nonviability posed no barriers which would prevent a fetus from being considered a "person" with rights. Furthermore, it would have been a relatively simple matter in 1973 for the Supreme Court to have accepted the New York Court of Appeals' opinion in *Byrn v. New York City Health and Hospital Corp.* in declaring the unborn child in the womb to be a living human being. What this review suggests is that the Supreme Court had ample precedent to uphold either position in the abortion controversy.

INSTEAD, the Court applied its discovery of "privacy," developed in *Griswold v. Connecticut* (1965), to freedom of choice for the pregnant Jane Roe, refusing any longer to recognize the fetus as a human being. While appearing in *Wade* to weigh in delicate balance the rights of individual privacy against legitimate state interests in protecting life, and while claiming to reject requests for an unqualified right to abortion, the Supreme Court in reality supported only the interests of the pregnant woman to choose whether or not to have an abortion. In reaching its decision in *Wade*, moreover, the Court relied upon presumption and inaccurate data to rationalize its stand favoring legalized abortion.

First, the pro-abortionists argued that the "original" nineteenth century anti-abortion statutes were enacted to protect the mother from dangerous and sometimes fatal surgical techniques. The Court cited "some scholarly support for this view of original purpose," whereupon it totally accepted the historical research put forth by one scholar—an ally of the pro-abortion movement. This was clearly an incomplete reading of the literature, and subsequent research by James C. Mohr argues definitively that a concern for fetal life, and not the risks from abortional surgery, prompted the states to pass restrictive legislation during the nineteenth century.

Second, to document changing attitudes toward abortion, *Wade* mentions that liberalized abortion was supported by the American Bar Association (ABA), the American Medical Association (AMA), and the American Public Health Association (APHA). A reading of their policy statements, however, shows that only the APHA explicitly backed abortion-on-demand. The ABA in 1972 endorsed only ALI-type reforms, and the AMA's position was even more complicated.

The Supreme Court's third error proved to be most damaging to the anti-abortion position. The Court admitted that the question of when life begins was one with which it could not easily deal. Nevertheless, the Court emphasized the extent of the belief, especially among Protestants and Jews, that human life should be recognized only from birth. Subsequent research by Judith Blake, however, indicates that the vast majority of Catholics and non-Catholics tend to date the beginning of life at conception or quickening. In taking, for practical purposes, the position that protectable life begins at birth, the Supreme Court denied any validity to that ethical belief which lies at the heart of the anti-abortion position. For opponents of abortion, the Court's ruling was an unqualified defeat. The Court would not consider appeals based upon the argument that the fetus is a "person." This winner-take-all nature of the *Wade* decision is directly responsible for the turmoil which encircles the abortion controversy today. From this juncture, the anti-abortion forces had no recourse but to aggressively work to reverse *Wade* by legislative enactment or by constitutional amendment.

The 1970s: a new level of conflict

THE SUPREME COURT'S legalization of abortion raised as many questions as it settled. Before the Court issued subsequent rulings, for example, it was unclear whether a minor could obtain an abortion without parental consent or whether a wife needed the concurrence of her husband. Another question left unsettled was whether the new-found "right" to an abortion was an entitlement. Most of these "gray areas" in the *Wade* decision were exploited by abortion opponents to restrict its availability, so the very ambiguity of abortion on-demand served to expand the conflict.

Unlike the debate over therapeutics, moreover, elective abortion gained social significance because any woman, for practically any reason, could try to obtain a legal abortion. After *Wade* the proponents of abortion, in fact, shifted their energies to the task of assuring equal access to abortion services, especially by the poor, which again had the effect of magnifying conflict over this issue.

The 1970s debate over abortion was no longer limited to its short-term effects, for the opponents now linked abortion to other volatile political issues of the day. One side viewed elective abortion as undermining the woman's role in society as well as the sanctity of the family unit. Opposition to abortion became entangled with opposition to ERA. Anti-abortion arguments were also linked to a "conservative" political ideology and to a belief in strict personal morality. The major research on this question is provided by Professor Donald Granberg of the University of Missouri, and he finds that the primary difference between pro-life and pro-choice activists relates to their attitudes toward such related issues as sex education, pornography, extramarital relations, and homosexuality. Within the political milieu of the 1970s, therefore, abortion became a codeword for a larger ideological perspective for both its proponents and opponents alike.

And finally, "on-demand" abortion was a radical departure in public policy, and few spokesmen on either side of the controversy were fully prepared for the magnitude of the *Wade* decision. Our reading of the anti-abortion literature suggests that the opposition was psychologically prepared to accept defeat in those states which enacted abortion reform, though they clearly did not relish the prospect. This was simply part of democratic politics. The idea of deciding this question in the courts, however, was steadfastly opposed by the anti-abortion forces because it undermined the process of negotiation and compromise and denied effective representation to the unborn.

Beyond changing the terms of the abortion debate, *Wade* increased political conflict by expanding the scope of participation in this controversy. In contrast to the "elitist" quality of the 1960s pro-reform lobby, the organizations now mobilized against legalized abortion assumed the characteristics of a "mass" movement. Involvement of the public in the anti-abortion movement occurred not only within the Catholic church and its affiliated organizations but also through pro-life groups which were able to recruit followers, raise money, and fashion an extensive organization apparatus at the local level.

DURING THE 1960s, moreover, public opinion was compatible with the objective of abortion reform, but in the 1970s it diverged from the goals being advanced by abortion advocates. The public never fully accepted the "right" of abortion on demand. It would appear, given the available opinion poll data, that (1) the Supreme Court's decision has slowly gained acceptance, but that (2) the Court's implementation of *Wade* is not approved, and that (3) the idea of purely elective abortion remains unpopular.

In answer to the following question—"In general, do you favor or oppose the U.S. Supreme Court decision making abortions up to three months of pregnancy legal?"—a series of Harris Surveys taken during 1972-1979 indicated that a majority of Americans, beginning in 1973, approved of the Court's decision, when stated in these terms. By 1979 three-fifths approved and thirty-seven percent disagreed. But of course the Supreme Court's decision had legalized abortion, strictly speaking, for all nine months and freed it from most state regulation for the first *six* months of pregnancy. The Harris results can only be taken to show that *at least* two-fifths of the national sample remains opposed to *Wade* six years after that decision was rendered. But in addition, other surveys show that most citizens favor restricting abortions to state residents, having it performed only in hospitals, and requiring the husband's approval where necessary. When asked whether abortions should be limited by circumstance, the majority of Americans continues to favor restrictions rather than purely elective abortion. The public has always exhibited greater approval for "hard" reasons for abortion, meaning those recommended by the American Law Institute, and socio-economic reasons consistently elicit less than majority support in most opinion polls. In general, consensus is achieved among different socio-economic groups on therapeutic abortion but not on socio-economic grounds, and lower socio-economic groups are especially vulnerable to changes in the public mood with regard to the latter.

One paramount reason why the reform movement during the 1960s was mainly consensual and no effective opposition could be launched was because the official position of the Catholic church was not actively supported by lay Catholics. It may be that religious teachings against abortion, in the abstract, did not relate well to the needs for abortion when the mother's and child's health were threatened. But once the Supreme Court transformed the issue into a question of abortion on demand, the teachings of the Catholic church began to make more sense to its constituency. Thus, *Wade* expanded the scope of conflict over abortion by activating a latent source of opposition to it, that by lay Catholics.

Apart from the tenuous support given to *Wade* by public opinion is the fact that a substantial number of Americans favor efforts to overturn that decision by legislative enactment or by constitutional amendment. Few surveys have been taken on this question, but the findings of those which have suggest that a majority of citizens do support a ban on public funding for abortions. There is less approval for a total prohibition by amendment, however; a 1976 Gallup Poll found that forty-five percent favored this more extreme measure.

NOT ONLY HAS abortion politics in the 1970s differed from the 1960s both in terms of its issue characteristics and its level of political conflict, but the quality of political competition affecting abortion also changed fundamentally. First, the sides to this dispute are now *polarized;* second, *personal* confrontation has replaced reasoned dialogue.

Abortion has now taken on all the marks of a "community conflict." This concept suggests a controversy which engenders a high degree of emotionalism, widespread involvement by the mass citizenry, and its persistence over time. It typically has been applied to disputes which erupt in localities and which engulf such communities in their entirety. During the 1950s the issue of fluoridating public water supplies was one frequent manifestation of community conflict. When an issue becomes polarized, as usually occurs in the course of community conflicts, the question is framed as a "yes or no" proposition. All parties to the dispute are forced to choose between them, and the middle ground is increasingly difficult to articulate.

The shift from issue debate to personal confrontation is also predictable in instances of community conflict. Opinion surveys show that political elites are more tolerant than citizens of political differences. This is exemplified by the workings of our legislative assemblies in government where inter-personal norms bolstered by organizational rules permit many serious political disputes to be aired without arousing personal animosities. For the citizen, who typically does not have many opportunities to be tested in this manner, the occasion which arouses political conflict can easily lead to its personalization. There are strong psychological forces at work here; we tend to direct all positive attributes onto our allies and to project all negative qualities on our enemies.

The abortion issue has not resulted in confrontation to the degree experienced during the civil rights movement or the anti-Vietnam protest days, but compared to the 1960s the use of mass demonstrations and direct action is more evident today. Pro-life extremists, for example, have resorted to firebombing abortion clinics in several cities and have harassed the patients and staff at other facilities. Both sides have taken to mounting marches and flaunting evocative public symbols. The increase in political confrontation has led some observers to view abortion as an instance of "single-issue" politics. But this phenomenon is simply the manifestation on the national level of the kinds of behavior patterns which typify community conflict at the sub-national level.

This "single-issue" quality of abortion politics strains the democratic "rules of the game" in our society. The debate over abortion suggests that the norms of political civility do not hold when an issue mobilizes groups whose members have an emotional commitment to one, all-encompassing cause. That our regime does successfully restrain interest-group competition in most instances is explained by the fact that single-issue groups rarely develop over "economic" issues. Interest-groups, on the other hand, are organized to safeguard economic gains, and their membership usually defers to the judgment of leaders as to how best to accomplish that goal. Few members are actively involved, let alone ideologically committed, to the larger purposes of trade associations, professional groups, and the like. But in abortion politics, pro-life and pro-choice groups have had the double effect of sustaining a high-intensity conflict at the grass-roots level while denying to political elites the discretion needed to arrange a political settlement to this issue. Consensus-building on abortion remains the key issue to be resolved, and this problem began with the Supreme Court's *Wade* decision.

Consensus-Building and Abortion

ABORTION HAS been a concern of our national government only since 1973. Before then it was regulated by the states as part of their "police powers" to protect the health, welfare, and morals of the citizenry. Congress and the Executive became involved in this dispute because *Wade* destroyed that political consensus on abortion "reform" achieved during the 1960s. *Wade* short-circuited public opinion on abortion, violated the prerogatives of the states over this policy area, and increased tensions between the Court and the popularly elected branches of government.

Tremendous social change has affected American society in the past three decades, and many of these changes have touched "lifestyle" issues — race, sexual mores, and women's rights, to mention but a few. Without doubt the Supreme Court acted on these issues because the Congress refused to deal aggressively with obvious and serious injustices. But too often proponents of social change are concerned only with righting a wrong, demanding additional rights and liberties, or enacting new laws. They assume that long-standing problems can be erased with one stroke of a pen, and that the majesty of the law will solicit the obedience of the citizenry. But social problems persist, there are few simple solutions to complicated issues, and the people have a tremendous capacity to resist compliance with what they see as ill-advised legislation. The effective implementation of any public policy ultimately depends upon its *legitimacy*, and this is largely determined by the manner in which political consensus was achieved when the policy is enacted into law.

The provision of abortion services depends upon the voluntary cooperation of physicians, nurses, social workers, and numerous other health-care professionals, as well as state and local government officials. Given the decentralized nature of America's health care delivery system, therefore, compliance with *Wade* can be greatly affected by the continuing struggle between pro-life and pro-choice forces. And the record clearly shows that health care professionals have not responded to the demand for abortions. The Alan Guttmacher Institute monitors this development year-by-year, and its findings document a serious maldistribution of abortion services in this country. In 1976, for example, only twenty-one percent of our 2,060 public hospitals allowed abortions to be performed in their facilities, and this situation is little changed today.

CONGRESSMAN HENRY HYDE is quoted as saying, "You don't compromise on this issue of abortion. How do you compromise when the issue is human life — not your life, somebody else's life." Hyde's comments signal the fundamental reason why it is so difficult to resolve the abortion controversy to the satisfaction of all parties. Issues which are "economic" in character are more easily resolved because the antagonists can always, in the final analysis, agree to "split the difference." This is not easily done on a lifestyle question, and particularly on an issue of morality. Related to this is the fact that *Wade*, as a public policy statement, did not reflect the balance of power between the contending forces in this struggle. While there can obviously be winners and losers in the legislative process, many scholars argue that the workings of Congress, with its need for compromise, bargaining, and negotiation, guarantees that "intense minorities" will not lose entirely in the final outcome. But this process is not characteristic of judicial decision-making, as *Wade* clearly shows. In that ruling, the Supreme Court addressed the concerns of a small number of abortion militants while ignoring the growing right-to-life movement and misreading public opinion on this entire question. As a result, the pro-lifers have gained the momentum in this struggle today, and their views predominate in Congress and our state legislatures.

The problem of consensus-building is further compounded by the fact that leadership on this question has sometimes been assumed by ultra-conservatives who see an opportunity to exploit this issue for political gain. By focusing on abortion, for example, Republicans can undermine the commitment of working-class voters to the Democratic party.

Historically the less affluent voted Democratic for economic benefits, but now Republicans are appealing to their conservatism on abortion and other lifestyle issues. The Republican party favors a pro-life amendment to the Constitution whereas the Democratic party has generally stood behind the *Wade* decision. This definition of abortion as a partisan dispute reflects the greater conflict surrounding this issue since 1973.

At this juncture in history, therefore, it appears that consensus-building on abortion will take one of two forms. As one alternative, judicial supremacy in this policy area may be directly challenged by a constitutional amendment — either a pro-life version banning abortions or a states' rights amendment returning jurisdiction over this question to the individual states. To date, nineteen states have called for a Constitutional Convention to rewrite the law on abortion, and what gravely concerns the pro-choice advocates is their location in every region of the country. These states include Delaware, Massachusetts, New Jersey, Pennsylvania, and Rhode Island in the East; Alabama, Arkansas, Louisiana, Kentucky, Mississippi, and Tennessee in the South; Idaho, Nevada, and Utah in the West; and Indiana, Nebraska, Oklahoma, Missouri, and South Dakota in the Midwest. However, it would seem that the immediate prospects for overturning *Wade* by amendment are not good. No pro-life amendment has ever been considered by the entire House of Representatives or Senate, although many have been introduced into Congress every year since *Wade*. And an amendment would require a two-thirds vote in the House and Senate as well as the concurrence of three-fourths of the states.

Another alternative would be a "political" one, involving an understanding between the branches of government. And there does seem to be an emerging area of agreement among lawmakers. Congress and the majority of state legislatures approve of abortion for medical necessity; even the Hyde Amendment provided for this. On the other hand, there is very little support at the national or state levels for fully legalized abortion. This is exemplified by the Hyde Amendment, which permitted the states to reassert their priorities over abortion policy. And the trend has been clear.

By the end of 1978 only ten states (and the District of Columbia) agreed to pay for all abortions or those deemed medically necessary. Sixteen more states paid for abortions only when the mother's life was threatened; five others would pay for abortions when the woman's life was endangered or in cases of incest or rape; and eighteen states accepted the Hyde Amendment language and paid for abortions when the mother's life was threatened, where pregnancy was caused by rape or incest, or where the woman might suffer lasting physical harm. In 1978, eighty percent of all abortions paid for were done because the mother's life was threatened; less than twenty percent involved a situation where serious physical health problems existed; and only about two percent involved cases of rape or incest. Therefore, the vast majority of states agreed to fund abortions for those "therapeutic" indications (except for fetal abnormality) which had been proposed by the American Law Institute twenty years earlier.

THESE PARAMETERS of abortion policy will not satisfy the pro-life or pro-choice militants, but they suggest the beginning of a solution to this dilemma. We do not argue that this scenario is the "best" or the "moral" solution to the problem of abortion, but we do suspect that it may be the viable alternative in terms of the requirements of consensus-building. For one thing, therapeutic abortion is solidly supported by the citizenry as well as health-care professionals. For another, the Supreme Court has opened the door to this kind of resolution of the abortion issue by upholding the constitutionality of the Hyde Amendment. Finally, as imperfect as this option may seem, it comes closer to addressing the concerns of pro-life advocates that abortion not be used indiscriminately as an easy solution to difficult moral and sexual problems. Furthermore, by this solution, the political system will have responded to a very real social problem but in a manner which re-establishes the viability of public policy and the legitimacy of our governmental institutions. The major lesson to be learned from our experience with abortion politics, unfortunately, is that we had to experience the debilitating effects of this long struggle in order to fashion a solution to the abortion issue which was so obviously indicated two decades ago—before the intrusion of the Supreme Court.

(FROM THE CHRISTIAN CENTURY, JAN. 6-13, 1982)

The Limits of Judicial Intervention in Abortion Politics

RAYMOND TATALOVICH and BYRON W. DAYNES

THE SUPREME COURT'S landmark 1973 rulings in *Roe* v. *Wade* and *Doe* v. *Bolton* did not resolve the abortion controversy but rather aggravated it to the point where the very fabric of democratic politics is threatened. In its present form, the abortion debate joins such issues as abolitionism, school desegregation, Prohibition and Bible reading in the schools because it involves primarily "normative" concerns rather than purely economic interests. The debate over abortion today is a contest between divergent value systems, and the dispute is so intense that the antagonists cannot even "agree to disagree." They fail to acknowledge a common ground for argument, and for that reason a settlement is far removed.

Tremendous social change has affected American society over the past three decades, and many of these changes have involved life-style issues – race relations, sexual mores and women's rights. Without question the Supreme Court acted on these issues because the Congress refused to deal aggressively with obvious and serious injustices. But too often proponents of social change are concerned only with righting a wrong, demanding additional rights and liberties, or enacting new laws. They assume that long-standing problems can be erased with one stroke of a pen, and that the majesty of the law will solicit the obedience of the citizenry. But as we know, social problems persist, there are few simple solutions to complicated issues, and the people have a vast capacity to resist compliance with what they see as ill-advised legislation. The effective implementation of public policy depends ultimately on its *legitimacy*, and this is generated largely by the manner in which political consensus is achieved when a public policy is originally enacted. The persistence of the abortion debate simply confirms the view that consensus-building with regard to abortion has never been fully achieved.

The provision of abortion services depends on the voluntary cooperation of physicians, nurses, social workers and other health-care professionals. And public opinion affects the delivery of abortion services insofar as it shapes the social environment within which health care is provided to the citizenry. It is apparent that America's health-care system has not responded to the demand for abortions. The Alan Guttmacher Institute monitors this development year by year, and its findings document a serious maldistribution of abortion services. In 1976, for example, only 21 per cent of the 2,060 public hospitals allowed abortions to be performed in their facilities, and this situation has improved little today.

THIS RESISTANCE is directly attributable to the nature of the Supreme Court's *Wade* decision; accordingly, the challenge which abortion now poses for our political system need never have come to pass. This entire question did not begin with such ominous overtones, and we should properly differ-

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entiate between the abortion issue which arose in the 1960s and that which emerged during the 1970s. Only by fully understanding this difference can we, as citizens, appreciate how the abortion controversy was transformed and intensified, and what steps may be required to resolve this question successfully in the future.

During the period 1966–1972, 14 states "reformed" their 19th century antiabortion laws along the lines of the Model Penal Code recommended by the American Law Institute, which advised the termination of a pregnancy whenever the mother's physical or mental health was jeopardized, when there was a serious fetal abnormality, or when pregnancy resulted from rape.

New York, Alaska, Hawaii and Washington in 1970 "repealed" their original statutes in order to permit abortion as an elective procedure – "abortion on demand." These 18 states represented 40 per cent of the population in 1970. These gains by abortion reformers, therefore, were quite impressive. In most instances "therapeutic" abortion was enacted by these various states without much turmoil. The arguments for reform had been made by a small number of activists, supported mainly by professional and health-care organizations, and the opposition to abortion was not effectively mobilized at the grass-roots level. Roman Catholics in particular were a decided minority in all those states adopting abortion reform, except New York. Surveys showed that physicians were solidly behind abortion reforms, and national polls of the citizenry also indicated majority approval for therapeutic abortion. What the 1960s showed was the gradual building of a consensus supportive of abortion *reform* rather than outright repeal. And conflict was further minimized because the terms of the abortion debate were narrowed to a specific issue having no major ramifications for society.

The goal of therapeutic abortion was so unambiguous that its opponents could not generalize its potential threat to society. Both pro- and antiabortion forces agreed that such legislation would permit relatively few women the opportunity to obtain a legal abortion. Opinion leaders, in addition, tended to accept the reformers' arguments and thereby viewed the abortion issue from a short-term, problem-solving perspective. That a moral position against abortion existed was duly noted, but the mass media tended not to take it seriously. The entire question was defined as a medical problem, not a moral one. The reformers appealed to the state legislatures to allow physicians to practice good medicine, and they were calling for almost a technical revision in the criminal code to reflect contemporary medical standards. Finally, the call for abortion reform was no radical alteration in public policy. There was a tradition behind it. All states, operating as they were under 19th century statutes, had permitted therapeutic abortion when the mother's life was threatened, and a few states even allowed abortions when the mother's health was endangered. In these terms, consequently, abortion advocates were only asking for added therapeutic exceptions to the law. And this position seemed modest, and incremental, compared to the opposition's viewpoint that any abortion – including those now legal – was immoral and should be prohibited.

THE EVOLVING consensus on "therapeutic" abortion was disrupted by the Supreme Court's *Wade* decision, but the pattern that would come to dominate abortion politics in the post-1973 era began to emerge beginning about 1969. It was shaped by three interrelated developments. First, the opposition to abortion appears to have stiffened, and the emerging right-to-life movement did not ease the debate, for it did not call for a return to therapeutics while opposing abortion on demand. Rather it sharpened the conflict by opposing *any* changes in the legal status quo.

At the same time, pro-choice advocates abandoned "reform" in favor of "repeal" as their fundamental goal. The National Association for the Repeal of Abortion Laws (NARAL) was founded in 1969 (it is now the National Abortion Rights Action League), and numerous feminist, health care, and religious groups began to endorse abortion on demand. In a related development, abortion-choice proponents shifted their focus to the judiciary, rather than expend limited resources on the slower process of lobbying state legislatures. Often this tactic was effective. In 1969, California's pre-1967 abortion law was invalidated by the state supreme court, and later that year the District of Columbia abortion statute was declared to be unconstitutional by a federal court. By the fall of 1970, there were five such cases pending before the Supreme Court, more than 20 in lower federal courts, and many more cases in the courts of 11 states.

> As a consequence of the Supreme Court's 'Wade' decision, the abortion issue in the 1970s became highly emotional, deeply polarized, and more combative.

A victory in the courts was complete because it was not possible for a judge to limit abortion to therapeutic cases. Thus in Pennsylvania the battle over abortion reforms in 1972 occurred at a time when the commonwealth had no existing law on abortion. Its original statute had been invalidated by a lower court. This winner-take-all quality of judicial decision-making is the chief reason the abortion controversy escalated to such a degree after *Wade*, and why it has been so difficult to re-establish a political consensus on this question.

In its *Wade* decision, the Supreme Court applied its definitions of "privacy" developed in *Griswold* v.

Connecticut (1965) to freedom of choice for the pregnant "Jane Roe." While appearing in *Wade* to weigh in delicate balance the rights of individual privacy against legitimate state interests in protecting life, and while claiming to reject requests for an unqualified right to abortion, the Supreme Court in reality supported *only* the interests of the pregnant woman in regard to choosing whether or not to have an abortion. In reaching its decision, the court added insult to injury by relying upon presumption and inaccurate data to rationalize its stand favoring legalized abortion.

The pro-choice people had argued that the 19th century abortion laws were enacted to protect the mother from dangerous and sometimes fatal surgical techniques. The court cited "some scholarly support for this view of original purpose," whereupon it totally accepted the historical research of one scholar who was an ally to the pro-choice movement. This was clearly an incomplete reading of the literature, and subsequent research by James C. Mohr argues that a concern for fetal life, and not the risks from abortional surgery, prompted the states to pass restrictive legislation during that era. Moreover, to document changing attitudes, *Wade* states that liberalized abortion procedures are now supported by the American Bar Association, the American Medical Association and the American Public Health Association. A reading of their policy statements, however, shows that only the APHA explicitly endorsed abortion on demand. The ABA in 1972 supported "therapeutic" abortions, and the American Medical Association's position was more complicated. In 1967 it had approved therapeutic abortion, but in 1970 that statement was broadened to permit physicians to terminate pregnancies in states in which abortion is fully legalized. The AMA policy did not, however, recommend the repeal of all statutes governing abortion in the states.

THE SUPREME COURT'S third error proved to be most damaging to the antiabortion position. It admitted that the question of when life begins was one with which it could not easily deal; nevertheless, in a rush to judgment, the court stated its belief that most Americans, certainly those of the Protestant or Jewish faith, felt that life begins at birth. But research by Judith Blake indicates that the vast majority of Catholics and non-Catholics tend to date the beginning of life at conception or at quickening. By taking this stand, the court denied any validity to that ethical belief which lies at the heart of the antiabortion position. Therefore, not only did *Wade* legalize abortion, but it hinted that the Supreme Court would not consider appeals based on the argument that the fetus is a "person."

As a result, the abortion issue in the 1970s became highly emotional, deeply polarized, and more combative. Unlike most political struggles over major public policy initiatives, which tend to be confined to the local or state or national level, the abortion controversy is analogous to a "community conflict" because it affects all governments in all regions of the nation. And this development is directly related to the nature of the *Wade* decision.

At the outset, *Wade* raised as many questions as it settled. Before the Supreme Court issued subsequent rulings, for example, it was unclear whether a minor could obtain an abortion without parental consent or whether a wife needed the concurrence of her husband. Another question left unsettled was whether the newfound "right" to an abortion was an entitlement, obliging the state to guarantee everyone access to abortions. The opposition exploited most of these gray areas in *Wade* to limit the availability of abortions. Similarly, elective abortion gained social significance because any woman, for virtually any reason, could try to obtain an abortion. After *Wade*, moreover, the proponents shifted their energies to the task of assuring equal access to abortion services for the poor, a move which again had the effect of exacerbating conflict.

Within the political milieu of the 1970s, abortion became, for both sides in the argument, a code word for a larger ideological perspective. No longer was the abortion debate limited to a discussion of short-term effects; it was now linked to other volatile political issues of the day. The major research on this question is provided by Donald Granberg of the University of Missouri, and he finds that the primary differences between pro-life and pro-choice activists are to be found in their attitudes toward such issues as sex education, pornography, extramarital relations and homosexuality.

At the same time, the abortion issue was grossly simplified; it is today a dispute involving fundamental principles. While the opposition argues that *Wade* sanctioned "murder," the pro-choice advocates view the entire question as one of civil rights and liberties. The abortion debate has taken on strong sectarian overtones, as represented primarily by the Catholic Church and fundamentalist Protestant denominations on the one side, and liberal Jewish and Protestant bodies on the other. For its proponents, the "right" to an abortion is as fundamental as our First Amendment freedoms, and the pro-life movement is seen to be a case of religious persecution. According to the pro-choicers, the Catholic Church is trying to impose its value system on society as a whole.

Finally, abortion on demand was a radical departure in our public policy, and few activists on either side of this controversy were fully prepared for the magnitude of the *Wade* decision. Though they clearly did not relish the prospect of losing in the state legislatures, the antiabortion folk were psychologically prepared to accept such losses as part of the democratic process. The idea of deciding this question in the courts, however, never appealed to abortion opponents because it undermined the political process and denied effective representation to the unborn.

Beyond changing the terms of the abortion debate, *Wade* intensified the abortion controversy by expanding the scope of participation. Unlike the elitist character of the pro-choice lobby in the 1960s, the pro-life lobby assumed the characteristics of a mass movement; pro-lifers directly participated in electoral politics as well as utilizing conventional lobbying techniques. Opinion surveys consistently show a "class" bias to abortion attitudes: people in lower socioeconomic-status groups are more opposed to abortion, and especially elective abortion, than are individuals in more affluent circumstances. And whereas public opinion was supportive of abortion *reform*, it never fully crystallized around those goals being advanced by the pro-choice people in the 1970s. The surveys consistently find that the majority of Americans do not favor abortion without explicit justification, and socioeconomic reasons solicit much less approval than medical indications. Thus, on-demand abortion lacks legitimacy in public opinion, and the distribution of public opinion on this question shows the potential for a massive reaction by the citizenry against that abortion policy embodied in *Wade*. Today a majority of Americans favor a ban on public funding for abortions, and more than two-fifths would approve a pro-life amendment to the Constitution.

WHAT ARE the prospects for re-establishing a political consensus on abortion? This is a formidable problem, for a number of reasons. Foremost among these is that, unlike the case of economic issues, it is much more difficult to "split the difference" on questions involving morality and values. Related to this is the fact that *Wade*, as a public policy statement, did not reflect the balance of power between the contending forces in this struggle. In this decision, the Supreme Court addressed the concerns of a small cadre of pro-choice militants while ignoring the growing right-to-life movement and misreading public opinion on this question. As a result, the pro-lifers became more organized in their negative response to the *Wade* decision; they have gained the momentum and their views now predominate in Congress and the state legislatures.

The problem of consensus-building is further compounded by the fact that leadership on this question has been taken over by ultraconservatives who see an opportunity to exploit the issue for political gain. By focusing on abortion, for example, Republicans can undermine the commitment of working-class voters to the Democratic Party. The Republican Party favors a pro-life amendment to the Constitution, whereas the Democratic Party has generally stood behind the *Wade* decision. The definition of abortion as a partisan dispute is testimony to the greater conflict surrounding this issue since 1973.

A final element affecting the consensus-building process is the nature of judicial-legislative relationships. The problem is that existing law, embodied in *Wade*, permits elective abortion; to reverse this state of affairs by legislative enactment necessarily requires Congress periodically to re-enact restrictions on the implementation and funding of abortion services. Such action has occurred wherever abortion has touched public policy, but it virtually guarantees the long-term survival of the abortion issue.

At this juncture in history, therefore, it appears that consensus-building on abortion will take one of two forms. As one alternative, judicial supremacy in this policy area may be directly challenged by a con-

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Brass-Rubbing

Under the hatchments on gold that fringe
The light in this dim undercroft,
Under achievements wrought with the broadsword
Slung up by its withers of leather,
The brass-rubber stoops on chopped stones
To the sheet-lattened corpse. Cryptic,
Tomb's tarnishments work stains
Through the paper shroud, oblong
And white; but faint as the marrow
Of bones, the spectre of knight
Begins to emerge, and the border
Braille of Gothic words half-eaten
Away by the dark. Carbon raises
His ghost and the date of centuries
Passed since in triumph of martial display,
Dust returned to dust, now returns
As dust buffed from the looking-glass
Likeness laid in the floor, who mirrors
Daily the trudge of the foot-traffic,
This face and minimal art
Of the brass-rubber, and overhead
Those habiliments of lost causes
And their once victorious wars.

Nancy G. Westerfield.

stitutional amendment – either a pro-life version banning abortions *or* a states' rights amendment returning jurisdiction over this question to the states. To date, 19 states have petitioned Congress for a constitutional convention to rewrite the law on abortion, but the immediate prospects for this tactic are not good. No pro-life amendment has ever been considered by the entire House of Representatives or Senate, even though many have been introduced every year since *Wade*, and any amendment would require a two-thirds vote in the houses of Congress as well as concurrence of three-fourths of the states.

Another alternative would be a "political" one, involving an understanding between the branches of government. What is needed is a *framework* within which to routinize decision-making on abortion so that, whenever the issue arises, political elites can address it without reopening old wounds. And there seems to be an emerging area of agreement among lawmakers. Congress and the majority of state legislatures approve of abortion for medical necessity; on the other hand, there is very little support at the national or state levels for fully legalized abortion. Moreover, the Supreme Court has opened the door to this kind of resolution of the abortion issue by upholding the constitutionality of the Hyde Amendment, banning the use of public funds for abortions. The Hyde Amendment also permitted the states to reassert their priorities over abortion policy, and the trend has been clear.

> Too often proponents of social change are concerned only with righting a wrong, and they assume that long-standing problems can be erased with one stroke of a pen.

By the end of 1978, only ten states (and the District of Columbia) agreed to pay for all abortions or all those deemed medically necessary. Sixteen more states paid for abortions only when the mother's life was threatened; five others would pay when the woman's life was endangered or in cases of incest or rape; and 18 states accepted the Hyde Amendment language and paid for abortions when the mother's life was threatened, when pregnancy was caused by rape or incest, or when the woman might suffer lasting physical harm. Therefore, the vast majority of states have agreed to fund abortions *only* for those therapeutic indications which had been proposed by abortion reformers 20 years earlier (except that they now do not fund abortions for reasons of fetal abnormality).

These parameters of abortion policy will not satisfy the pro-life or pro-choice militants, but they suggest the beginning of a solution to this dilemma. We do not argue that this scenario is the "best" or the "moral" solution to the abortion controversy, but we do suspect that it may be the best alternative in terms of the requirements of consensus-building. For one thing, therapeutic abortion is solidly supported by the citizenry as well as by health-care professionals. As imperfect as this option may seem, it comes closer to addressing the concerns of pro-lifers that abortion not be used indiscriminately as an easy solution to difficult moral and sexual problems.

Therapeutic abortion did not arouse an intense pro-life opposition during the 1960s, and we would anticipate that its establishment today as public policy would serve to diffuse pro-life zeal. Furthermore, by this resolution, the political system will have responded to the abortion problem but in a manner which re-establishes the viability of public policy and the legitimacy of our governmental institutions. The major lesson to be learned from our experience with abortion politics, unfortunately, is that we have had to experience the debilitating effects of this long struggle in order to fashion a "political" solution to the abortion issue which was so obviously indicated two decades ago – before the intrusion of the Supreme Court. ■

STANISLAW Z. LEMBRYCH, M.D.

9

Fertility Problems Following an Aborted First Pregnancy

In the last 20 years, interruption of pregnancy has been legalized in a number of countries. Despite this, abortion is by no means a settled issue, since the operation, however performed, is not devoid of the risk of complications. Adverse consequences are envisioned from sociological, moral, ethical,[5, 12, 27, 29] psychological,[2, 11] and clinical points of view.[1, 3, 4, 6-10, 12-22, 24-28, 30-34]

As a gynecologist, I have been particularly concerned with clinical complications. The above cited, fairly comprehensive literature mainly deals with immediate complications such as hemorrhages, laceration of the cervix, uterine perforation, inflammations of the reproductive organs, and menstrual disturbances. The number of complications and their intensity undoubtedly depends on the experience of the operator, the patient's adherence to the doctor's recommendations, as well as the abortion technique used.[7, 8] Such things as an inadequate gynecologic examination prior to the operation, the inattention of the operator (e.g., in cases of a perforated uterus), or the retention of fetal and placental tissue (e.g., in cases of hemorrhage) may also bring on complications.

The main subject of my interest is, however, the remote sequels of interrupted pregnancy in general, and in particular the effect of an abortion on the woman's subsequent fertility, pregnancy, labor, and puerperium.[17, 19]

Everyday clinical observation seems to indicate that, among the patients I have treated because of failure to conceive or carry to term, a considerable percentage were women who had had their first pregnancy interrupted. In my investigation of this phenomenon, a group of 52 women hospitalized 10-15 years ago for interruption of their *first* pregnancy was examined. An exact history and a meticulous analysis of case records revealed the following.

Absence of Complications

In 27 cases conception, carrying to term, pregnancy, and labor were free of complications that might have been related to interruption of the first pregnancy. In all women the second conception took place at 12-24 months of conjugal life, with another interruption of pregnancy in 12 cases, one birth in 3 cases, two births in 9 cases, and three births in 5 cases. The total numbers of pregnancies and labors were 48 and 36, respectively.

Failure to Conceive

In six women the failure to conceive lasted for three-nine years. For two of them a four-six year treatment was followed by conception and delivery of live, full-term babies; in one case a tubal pregnancy was terminated with removal of the oviduct. In the remaining three cases a persistent occlusion of the oviducts and a failure of the treatment applied were found. The factor of male infertility was excluded at the beginning of the treatment.

Failure to Carry to Term

In this group comprising 11 patients, the total number of pregnancies was 33, including 14 cases terminated with spontaneous abortion, 3 cases with immature deliveries (between 17 and 27 weeks of gestation), 6 cases of premature birth (between 28 and 37 weeks of gestation), and only 10 cases of full-term newborns. Detailed data from this group are given in Table 1.

The table calls attention to the failure, in this group, of all the pregnancies occurring immediately after abortion of the first pregnancy. From these pregnancies only two newborns, both premature ones, with birth weights of 2,200 grams could be saved. Two women in this group, married for seven and nine years respectively, are still childless because of the failure to carry to term. Noteworthy also are cases 10 and 11 in which full-term pregnancies were preceded by three consecutive failures. Finally, it is striking that of 10 full-term pregnancies, three showed signs of threatened abortion and required hospitalization. In three others, the symptoms of cervical insufficiency necessitated application of circular sutures to the cervix (McDonald-type cervical cerclage).

TABLE 1.

FAILURE TO CARRY TO TERM FOLLOWING INTERRUPTION OF FIRST PREGNANCY

Case Number	*Pregnancy*					
	First	*Second*	*Third*	*Fourth*	*Fifth*	*Sixth*
1	Premature Delivery 31 weeks					
2	Premature Delivery 35 weeks					
3	Spontaneous Abortion 8 weeks	Spontaneous Abortion 16 weeks				
4	Premature Delivery 29 weeks	Missed Abortion 14 weeks				
5	Premature Delivery 30 weeks	FULL TERM DELIVERY				
6	Spontaneous Abortion 8 weeks	Spontaneous Abortion 18 weeks	FULL TERM DELIVERY Threatened Abortion			
7	Immature Delivery 27 weeks	Premature Delivery 33 weeks	FULL TERM DELIVERY McDonald Cerclage Operation*			
8	Immature Delivery 27 weeks	Spontaneous Abortion 7 weeks	FULL TERM DELIVERY McDonald Cerclage Operation	Spontaneous Abortion 15 weeks		
9	Spontaneous Abortion 7 weeks	FULL TERM DELIVERY Threatened Abortion	Immature Delivery 20 weeks	FULL TERM DELIVERY		
10	Spontaneous Abortion 8 weeks	Spontaneous Abortion 8 weeks	Spontaneous Abortion 8 weeks	FULL TERM DELIVERY	FULL TERM DELIVERY	
11	Immature Delivery 6 weeks	Spontaneous Abortion 8 weeks	Spontaneous Abortion 9 weeks	FULL TERM DELIVERY Threatened Abortion	Spontaneous Abortion 9 weeks	FULL TERM DELIVERY McDonald Cerclage Operation

*The McDonald cerclage operation involves the application of circular sutures to an incompetent cervix.

Other Complications in the Course of Pregnancy and Labor

Although the analysis was mainly concerned with the failure to deliver a viable baby, attention was also paid to other pregnancy and labor complications which, in my opinion, are closely related to the original abortion. Thus, the group examined included four women in whom interruption of the first pregnancy was followed during the next gestation by signs of threatened abortion with vaginal bleeding. All of the women were hospitalized with good results, the pregnancies terminating with deliveries at term. The course of their three consecutive pregnancies was uneventful.

In four other cases the course of labor immediately after interruption of the first pregnancy was complicated by profuse vaginal bleeding in the third stages of labor, the result of uterine atony. In these women, an additional four pregnancies terminating with physiologic ("normal") births were observed later in life.

Thus, 25 of 52 examined women (48.1 percent) who had their first pregnancy interrupted subsequently showed complications.

TABLE 2.

	N	%
Failure to Conceive	6	11.5
Threatened Abortion	7	13.5
Spontaneous Abortion	14	26.9
Extrauterine Pregnancy	1	1.9
Insufficiency of Cervix	3	5.8
Immature or Premature Delivery	9	17.3
Postpartum Hemorrhage	4	7.7
Total Number with Complications	25	48.1

Some patients exhibited more than one of the above complications.

Of 51 total pregnancies in this group, 38 (74.5 percent) of these had complications. The results seem to be telling; they confirm the observations of other authors, indicating the prevalence of sterility, spontaneous abortion, cervical insufficiency, and premature delivery in women who underwent a previous abortion.[4, 10, 23-25, 32-34] It should be stressed that the results from our studies showing a higher percentage of complications can be accounted for by noting that the women examined were only those whose first pregnancies were interrupted.

DISCUSSION

I have been among the first to draw attention to the complications in subsequent pregnancy and labor as the result of interruption of the first gestation.[17] Women more than 28 weeks pregnant were analyzed who had a history of interrupted pregnancy (two groups of 143 and 214 cases). The analysis of the material has revealed that interruption of the first pregnancy causes a statistically significant increase in complications of subsequent pregnancies and labors. They are: threatened abortion, placenta previa, premature separation of the placenta; premature labor with immature fetus; premature rupture of the membranes; prolonged first stage of labor as a result of cervical dystocia; complications of the placental stage: incomplete or attached placenta, atonic bleeding; intrapartum lacerations of the cervix; and considerable blood loss in labor.

In my opinion, posttraumatic and postinflammatory lesions of the cervix and endometrium underlie these complications. Cervical damage is due to energetic dilatation of the cervical canal and the external and internal ora of the cervix; two major results are possible. First, the muscular bundles may be injured and cause cervical insufficiency. The next pregnancy might then be complicated by premature rupture of the membranes, spontaneous abortion, or premature delivery.

Second, microtrauma of the cervix may be responsible for local hemorrhage, inflammatory conditions, proliferation of the connective tissue, and cicatrization of the cervix. The involved complications would be cervical dystocia, increased frequency of prolonged labors, and cervical lacerations.

Increased frequency of bleeding during pregnancy and in the placental stage of labor as well as greater blood loss in labor are likely to be the effects of curettage of the uterine cavity and damage to the uterine endometrium. Moreover, the analysis of these women revealed a higher mortality rate for the newborns related to increased numbers of premature deliveries and single cases of immunization in Rh-negative mothers.

Nearly all pertinent reports confirmed our observations in part or in whole,[6, 9, 13-15, 22, 25, 26, 33, 34] except that of Hogue dealing with premature deliveries,[15] and that of Miltenyi and Szabady concerning spontaneous abortions.[21]

The above results indicate unequivocally that an operation for interruption of pregnancy, however scrupulously it may be performed, may give rise to serious complications. The common complications can be treated easily and generally subside without serious consequences;

the more crucial problem is late complications affecting the woman's fertility and reproduction. This point is mostly overlooked when the operation is decided upon.

Clearly, the possibility of numerous immediate and long-term complications should compel the physician to be more cautious with indications for recommending interruption of pregnancy, especially the first pregnancy, and to inform the woman about the complications involved.

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“How we respect life is over-riding moral issue . . .”

By THE REV. JESSE L. JACKSON

THE REV. JESSE JACKSON

The question of "life" is The Question of the 20th century. Race and poverty are dimensions of the life question, but discussions about abortion have brought the issue into focus in a much sharper way. How we will respect and understand the nature of life itself is the over-riding moral issue, not of the Black race, but of the human race.

The question of abortion confronts me in several different ways. First, although I do not profess to be a biologist, I have studied biology and know something about life from the point of view of the natural sciences. Second, I am a minister of the Gospel and therefore, feel that abortion has a religious and moral dimension that I must consider. Third, I was born out of wedlock (and against the advice that my mother received from her doctor) and therefore abortion is a personal issue for me.

From my perspective, human life is the highest good, the summum bonum. Human life itself is the highest human good and God is the supreme good because He is the giver of life. That is my philosophy. Everything I do proceeds from that religious and philosophical premise. Life is the highest good and therefore you fight for life using means consistent with that end.

Life is the highest human good not on its own abstract merits, but because life is supernatural, a gift from God. Therefore life is the highest human good because life is sacred. Biologically speaking, thousands of male sperms are ejaculated into the female reproductive tract during sexual intercourse, but only once in a while do the egg and sperm bring about fertilization. Some call that conception accidental, but I choose to call it providential. It takes three to make a baby: a man, a woman and the Holy Spirit.

I believe in family planning. I do not believe that families ought to have children, as some people did where I was growing up, by the dozens. I believe in methods of contraception (prophylactics, pills, rhythm, etc.) I believe in sex education. We ought to teach it in the home, the school, the church, and on the television. I think that if people are properly educated sexually they will appreciate the act and know its ultimate function, purpose and significance.

Only the name has changed

In the abortion debate one of the crucial questions is when does life begin. Anything growing is living. Therefore human life begins when the sperm and egg join and drop into the fallopian tube and the pulsation of life takes place. From that point, life may be described differently (as an egg, embryo, fetus, baby, child, teenager, adult), but the essence is the same. The name has changed but the game remains the same.

Human beings cannot give or create life by themselves, it is really a gift from God. Therefore, one does not have the right to take away (through abortion) that which he does not have the ability to give.

Some argue, suppose the woman does not want to have the baby. They say the very fact that she does not want the baby means that the psychological damage to the child is reason enough to abort the baby. I disagree. The solution to that problem is not to kill the innocent baby, but to deal with her values and her attitude toward life — that which has allowed her not to want the baby. Deal with the attitude that would allow her to take away that which she cannot give.

Some women argue that the man does not have the baby and will not be responsible for the baby after it is born, therefore it is all right to kill the baby. Again the logic is off. The premise is that the man is irresponsible. If that is the problem, then deal with making him responsible. Deal with what you are dealing with, not with the weak, innocent and unprotected baby. The essence of Jesus' message dealt with this very problem — the problem of the inner attitude and motivation of a person. "If in your heart . . . ." was his central message. The actual abortion (effect) is merely the logical conclusion of a prior attitude (cause) that one has toward life itself. Deal with the cause not merely the effect when abortion is the issue.

Pleasure, pain and suffering

Some of the most dangerous arguments for abortion stem from popular judgments about life's ultimate meaning, but the logical conclusion of their position is never pursued. Some people may, unconsciously, operate their lives as if pleasure is life's highest good, and pain and suffering man's greatest enemy. That position, if followed to its logical conclusion, means that that which prohibits pleasure should be done away with by whatever means are necessary. By the same rationale, whatever means are necessary should be used to prevent suffering and pain. My position is not to negate pleasure nor elevate suffering, but merely to argue against their being elevated to an ultimate end of life. Because if they are so elevated, anything, including murder and genocide, can be carried out in their name.

Often people who analyze and operate in the public sphere (some sociologists, doctors, politicians, etc.) are especially prone to argue in these ways. Sociologists argue for population control on the basis of a shortage of housing, food, space, etc. I raise two issues at this point: (1) It is strange that they choose to start talking about population control at the same time that Black people in America and people of color around the world are demanding their rightful place as human citizens and their rightful share of the material wealth in the world. (2) People of color are for the most part powerless with regard to decisions made about population control. Given the history of people of color in the modern world we have no reason to assume that whites are going to look out for our best interests.

Politicians argue for abortion largely because they do not want to spend the necessary money to feed, clothe and educate more people. Here arguments for inconvenience and economic saving take precedence over arguments for human value and human life. I read recently where a politician from New York was justifying abortion because they had prevented 10,000 welfare babies from being born and saved the state $15 million. In my mind serious moral questions arise when politicians are willing to pay welfare mothers between $300 to $1000 to have an abortion, but will not pay $30 for a hot school lunch program to the already born children of these same mothers.

I think the economic objections are not valid today because we are confronted with a whole new economic problem. The basic and historic economic problem has been the inability to feed everyone in the world even if the will were there to do so. They could not produce enough to do the job even if they wanted to. An agrarian and disconnected world did not possess the ability to solve the basic economic problem. That was tragic, but hardly morally reprehensible. Today, however, we do not have the same economic problem. The world is basically urban, industrial, interconnected, and technological so that we now, generally speaking, have the ability to feed the peoples of the world but lack the political and economic will to do so. That would require basic shifts of economic and political power in the world and we are not willing to pay that price — the price of justice. The problem now is not the ability to produce but the ability to distribute justly.

Psychiatrists, social workers and doctors often argue for abortion on the basis that the child will grow up mentally and emotionally scarred. But who of us is complete? If incompleteness were the criteria for taking life we would all be dead. If you can justify abortion on the basis of emotional incompleteness, then your logic could also lead you to killing for other forms of incompleteness — blindness, crippleness, old age.

Life is public and universal

There are those who argue that the right to privacy is of higher order than the right to life. I do not share that view. I believe that life is not private, but rather it is public and universal. If one accepts the position that life is private, and therefore you have the right to do with it as you please, one must also accept the conclusion of that logic. That was the premise of slavery. You could not protest the existence or treatment of slaves on the plantation because that was private and therefore outside of your right to be concerned.

Another area that concerns me greatly, namely because I know how it has been used with regard to race, is the psycholinguistics involved in this whole issue of abortion. If something can be dehumanized through the rhetoric used to describe it, then the major battle has been won. So when American soldiers can drop bombs on Vietnam and melt the faces and hands of children into a hunk of rolling protoplasm and in their minds say they have not maimed or killed a fellow human being, something terribly wrong and sick has gone on in that mind. That is why the Constitution called us three-fifths human and then whites further dehumanized us by calling us "niggers." It was part of the dehumanizing process. The first step was to distort the image of us as *human* beings in order to justify that which they wanted to do and not even feel like they had done anything wrong. Those advocates of taking life prior to birth do not call it killing or murder, they call it abortion. They further never talk about aborting a baby because that would imply something human. Rather they talk about aborting the fetus. Fetus sounds less than human and therefore can be justified.

In conclusion, even if one does take life by aborting the baby, as a minister of Jesus Christ I must also inform and-or remind you that there is a doctrine of forgiveness. The God I serve is a forgiving God. The men who killed President John F. Kennedy and Dr. Martin Luther King, Jr. can be forgiven. Everyone can come to the mercy seat and find forgiveness and acceptance. But, and this may be the essence of my argument, suppose one is so hard-hearted and so indifferent to life until he assumes that there is nothing for which to be forgiven. What happens to the mind of a person, and the moral fabric of a nation, that accepts the aborting of the life of a baby without a pang of conscience? What kind of a person, and what kind of a society will we have 20 years hence if life can be taken so casually?

It is that question, the question of our attitude, our value system, and our mind-set with regard to the nature and worth of life itself that is the central question confronting mankind. Failure to answer that question affirmatively may leave us with a hell right here on earth.

(The Rev. Jesse Jackson, well-known Black leader and civil rights activist, is president of People United to Save Humanity (PUSH), a Chicago-based organization dedicated toward economic, political and cultural independence for the Black people.)

national RIGHT TO LIFE NEWS

JANUARY 1977

419 7th Street, N.W.
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Washington, D.C. 20004

[From the Visitor, Jan. 18, 1981]

WHY I AM PRO-LIFE

A SOCIAL JUSTICE PERSPECTIVE

(By Father Theodore M. Hesburgh, C.S.C.[1])

One would think this would be an easy assignment—to discuss concerns for human life from the perspective of social justice. Social justice has many concerns, but they all center about human life. I know the agenda well because I have spent much of my life as a priest working on it. First, civil rights were the great concern for there is no responsible human life in a democracy if one does not have some control over those who exercise governance in a society.

Without the power of the ballot, one is no better than a slave. That indeed was the condition of many of our minority citizens before the Civil Rights Commission, with help from many others, definitely obtained the vote for all in the Civil Rights Act of 1965. That was what we first set out to do in 1957, but not that alone. Our agenda was continually broadened, first to include educational and housing rights, and later employment opportunity and equal rights in the administration of justice.

Let me say a word about all of these. Education is the door to better employment and upward mobility. The availability of greater income then insures better housing in a better neighborhood with better educational opportunity for one's children, so that the upward human developmental cycle continues, generation after generation. Good education is the essential key. If it is not available on all levels, social justice is stymied, unemployment of uneducated minorities is rampant. One can then forget about better housing and better educational opportunities for one's children.

The trilogy of equal education, equal employment, and equal housing opportunity rests on the point of education. If the balance is not there, the triangle topples, none of the three rights at the heart of social justice for all is accomplished. That is why all of my early concern about social justice centered on educational opportunity, a right largely obtained through Title VI of the 1964 omnibus Civil Rights Act. Equal housing was subsequently insured by the Civil Rights Act of 1968.

The year 1964 represented a sea-change in American society. One day we Americans, in many of our states, were practicing apartheid as bad as the South African system. The next day the mores of more than two centuries were outlawed. No civilized nation has ever instituted such a basic change overnight.

It was a bright dawn for greater social justice, a proud day for America. The struggle would, of course, continue because social justice must be achiéved each day of each new year. The forces of evil are always alive and at work.

When I was fired from the Chairmanship of the Civil Rights Commission in 1972, 15 years after it began, I redirected my efforts to work of world social justice, an easy transition to the Overseas Development Council's Chairmanship, for ODC addresses social justice. Our world concerns for social justice speak to the basic needs required to create a larger possibility for human dignity and growth—food, shelter, health care, employment, literacy. Without these, there is no possibility of achieving a decent human life. We rightly criticize the social justice nightmare in South Africa where one-fifth of the population, which is white, enjoy four-fifths of the human resources available, while the four-fifths, the black population, has only one-fifth of the human life resources.

At ODC we continually emphasize that South Africa's situation is in microcosm the situation for social justice in all this world, where 80 percent of the population, which is colored, enjoys only 20 percent of the total world human goods. We euphemistically call this group of more than 100 countries the Third World, or the worst of them, the Fourth World. They will not be really helped until we find a new system of world justice, as we earlier tried for a better system in our own country. Social justice is a system, an institution, as much as it is an act, an individual virtue. One must be concerned for the totality of justice, for it touches every single human person, his or her dignity, hopes and dreams for a better human life.

I have indulged in this rather extensive preface to what I have to say about abortion from the social justice perspective because I believe that all of us have to be concerned about this whole range of social justice perspectives, whether local, national, or international. As John Donne said, "No man is an island." Neither is one single justice concern in isolation from the totality. Our concern must be as broad as all human life, everywhere. If we are allowed any preference, it must go to those most threatened, as Jesus said, "What you did for one of these, my least brethren, you did it for *Me*."

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It is for all of these considerations that I suffered several shocks on the occasion of the Supreme Court decision which granted legal abortion on request. The first shock was that the court that had given such great leadership during the Civil Rights struggle of the '50s and '60s should now render a judgment that, at least to me, seemed contrary to the moral instincts, not to mention convictions, of most Americans. It seemed fairly obvious to me that one cannot ground human rights, philosophically or theologically, anywhere but in the human person. It seemed equally obvious to me that individual or social justice has great transcendent purposes, to enlarge human dignity, to assure human development, to allow one and all to live more humanly, and, in a larger sense, to allow all to achieve in freedom their temporal and eternal goals as human persons. I have always been seized with the rightness of Maritain's words about the human person:

"The notion of personality involves that of totality and independence; no matter how poor and crushed he may be, a person as such is a whole and subsists in an independent manner. To say that man is a person is to say that in the depths of his being he is more a whole than a part, more independent than servile. It is to say that he is minute fragment of matter that is at the same time a universe, a beggar who communicates with absolute being, moral flesh whose value is eternal, a bit of straw into which heaven enters . . . the value of the person, his dignity and his rights belong to the order of things naturally sacred, which bear the imprint of Father of Being, and, which have in Him the end of their movement."

Maybe all of this was a bit metaphysical for the Justices who spoke of trimesters as if time could transcend eternity, or as if temporal values could outweigh eternal values. Anyway, they said it and the deed was done.

My second shock came from the fact that many of my valiant companions-in-arms during two decades and more of struggles for social justice, here and abroad, generally agreed with the Justices. I have tried hard to understand how what was so obvious to me was so unconvincing to them, many of whom were deeply moral persons, some leaders of minority groups, all more than moderately intelligent and dedicated to social justice. How did we lose them on this issue, regarding what I conceive to be the most basic right of all, the right to life, without which all other human rights are meaningless?

I wish I had an easy answer to this lack of consensus which thoroughly complicates this problem here and throughout the world. One must note likewise the rather open abortion laws in traditionally Catholic countries, like France and Italy. Why is the abortion issue so different from other civil rights which are generally protected by law?

One of my friends who happens to be a medical doctor favoring abortion notes that there are 40 million abortions in the world today, 30 million of which are spontaneous miscarriages, and the other 10 million induced. I don't know what one makes of this, except that nature may have its own mechanisms for fetuses that are imperfect.

The nub of the moral question seems to be that many people do not consider the fertilized ovum to be a human person possessing human rights. Even the angelic doctor, Saint Thomas Aquinas, thought it took a fairly long period for acquiring personhood and even differentiated the period for males and females. For myself, I recognize that personhood requires individuation, and until implantation occurs, there could be one or several persons involved. On the other hand, personhood is not conferred at birth, as though the ability of a fetus to survive outside the womb were paramount. Indeed, modern prenatal technology has advanced to the point where fetuses of 24 weeks or fewer can be saved, the "viability" has a shifting definition.

I do not think the philosophical issue of when personhood begins admits of an absolute answer, but, on the other hand, I do not think an absolute answer is necessary to what we are fundamentally considering in the moral order of social justice and abortion.

What really persuades me of the basic immorality of induced abortion is a sign I once saw in Chinese above a cemetery in Hong Kong. It said: "What you are I once was; what I am you soon will be." A fetus could well say to us, "What I am you once were; what you are I soon will be, if you let me."

The fetus from the first moment of life is on the way, irrevocably, barring abortion, to full human life and human personhood. We all passed through this stage. To deny the fetus life, is to deny a human being the opportunity that we all have had to live and love, to achieve a measure of human perfection, to have faith, to experience grace, to consciously love God and to aspire to eternal life. To deny that opportunity is to deny that for which social justice yearns and strives—full human development and fulfillment. It is to deny to another the greatest promise that life offers each one of us.

To deny life consciously is at best a benightedly serious deviation from what social justice most fundamentally demands, and at worse, for those who should know better, a sacrilege. It denies to another what we most prize for ourselves—to live, a sacred gift.

Having said all this, may I allude to the fact that social justice must be accomplished in a free human society where conscience reigns and where people often differ for sincere and subjectively honest reasons. At this juncture, we must persuade those with whom we disagree and with whom we must work, as we did during the Civil Rights campaign, for that which we think is a just solution. Democracies are not given to bludgeoning the opposition, but we are all committed to work for a just social order, geared to the common good as all law must be, yet giving special attention to the least brethren, at one moment a minority group, at another, beings unprotected as they develop in unborn human life.

I believe our efforts, both at persuasion and lawmaking will be most efficacious if we are seen to be consistently on the side of the unprotected, on the side of life threatened. As Doctor Albert Schweitzer said, "If a man loses reverence for any part of life, he will lose his reverence for all life." This means that our social justice efforts must range worldwide and must embrace the whole spectrum of systematic injustice, be it starving children, 15 million of whom will die this year in a world of plenty, those suffering economic blight and illiteracy by the sheer geographic prejudice of where they were born, women who suffer injustice on all levels, those many millions who are not free to live and worship as they wish, those racially discriminated against, to mention only a few concerns among many.

Hungering and thirsting for justice is a high calling for all Christians. It knows no bounds and it should not tire. But it is a universal hunger and thirst that must forge worldwide alliances to meet all the goals of social justice which are not unrelated to the Kingdom of God.

[From Newsweek, Sept. 20, 1976]

DISCRETIONARY KILLING

(By George F. Will)

It is neither surprising nor regrettable that the abortion epidemic alarms many thoughtful people. Last year there were a million legal abortions in the United States and 50 million worldwide. The killing of fetuses on this scale is a revolution against the judgment of generations. And this revolution in favor of discretionary killing has not run its course.

That life begins at conception is no disputable. The dispute concerns when, if ever, abortion is a *victimless* act. A nine-week-old fetus has a brain, organs, palm creases, fingerprints. But when, if ever, does a fetus acquire another human attribute, the right to life?

The Supreme Court has decreed that *at no point* are fetuses "persons in the whole sense." The constitutional status of fetuses is different in the third trimester of pregnancy. States constitutionally can, but need not, prohibit the killing of fetuses after "viability" (24 to 28 weeks), which the Court says is when a fetus can lead a "meaningful" life outside the womb. (The Court has not revealed its criterion of "meaningfulness.") But states cannot ban the killing of a viable fetus when that is necessary to protect a woman's health from harm, which can be construed broadly to include "distress." The essence of the Court's position is that the "right to privacy" means a mother (interestingly, that is how the Court refers to a woman carrying a fetus) may deny a fetus life in order that she may lead the life she prefers.

Most abortions kill fetuses that were accidentally conceived. Abortion also is used by couples who want a child, but not the one gestating. Chromosome studies of fetal cells taken from amniotic fluid enable prenatal diagnosis of genetic defects and diseases that produce physical and mental handicaps. Some couples, especially those who already have handicapped children, use such diagnosis to screen pregnancies.

ABORTION AS ALTERATIVE

New diagnostic techniques should give pause to persons who would use a constitutional amendment to codify their blanket opposition to abortion. About fourteen weeks after conception expectant parents can know with virtual certainty that their child, if born, will die by age 4 of Tay-Sachs disease, having become deaf, blind and paralyzed. Other comparably dreadful afflictions can be detected near the end of the first trimester or early in the second. When such suffering is the alternative to abortion, abortion is not obviously the greater evil.

Unfortunately, morals often follow technologies, and new diagnostic and manipulative skills will stimulate some diseased dreams. Geneticist Bentley Glass, in a presidential address to the American Asociation for the Advancement of Science, looked forward to the day when government may require what science makes possible: "No parents will in that future time have a right to burden society with a malformed or a mentally incompetent child."

WHO MUST DIE?

At a 1972 conference some eminent scientists argued that infants with Down's syndrome are a social burden and should be killed, when possible, by "negative enuthansia," the denial of aid needed for survival. It was the morally deformed condemning the genetically defective. Who will they condemn next? Old people, although easier to abandon, can be more inconvenient than unwanted children. Scientific advances against degenerative diseases will enable old people to (as will be said) "exist" longer. The argument for the discretionary killing of these burdensome folks will be that "mere" existence, not "meaningful" life, would be ended by euthanasia.

The day is coming when an infertile woman will be able to have a laboratory-grown embryo implanted in her uterus. Then there will be the "surplus embryo problem." Dr. Donald Gould, a British science writer, wonders: "What happens to the embryos which are discarded at the end of the day—washed down the sink?" Dr. Leon R. Kass, a University of Chicago biologist, wonders: "Who decides what are the grounds for discard? What if there is another recipient available who wishes to have the otherwise unwanted embryo? Whose embryo are they? The woman's? The couple's? The geneticist's? The obstetrician's? The Ford Foundation's? . . . Shall we say that discarding laboratory-grown embryo is a matter solely between a doctor and his plumber?"

But for now the issue is abortion, and it is being trivialized by cant about "a woman's right to control her body." Dr. Kass notes that "the fetus simply is not a mere part of a woman's body. One need only consider whether a woman can ethically take thalidomide while pregnant to see that this is so." Dr. Kass is especially impatient with the argument that a fetus with a heartbeat and brain activity "is indistinguishable from a tumor in the uterus, a wart on the nose, or a hamburger in the stomach." But that argument is necessary to justify discretionary killing of fetuses on the current scale, and some of the experiments that some scientists want to perform on live fetuses.

Abortion advocates have speech quirks that may betray qualms. Homeowners kill crabgrass. Abortionists kill fetuses. Homeowners do not speak of "terminating" crabgrass. But Planned Parenthood of New York City, which evidently regards abortion as just another form of birth control, has published an abortion guide that uses the word "kill" only twice, once to say what some women did to themselves before legalized abortion, and once to describe what some contraceptives do to sperm. But when referring to the killing of fetuses, the book, like abortion advocates generally, uses only euphemisms, like "termination of potential life."

Abortion advocates become interestingly indignant when opponents display photographs of the well-formed feet and hands of a nine-week-old fetus. People avoid correct words and object to accurate photographs because they are uneasy about saying and seeing what abortion is. It is not the "termination" of a hamburger in the stomach.

THE DEGRADATION OF MAN

And the casual manipulation of life is not harmless. As Dr. Kass says: "We have paid some high prices for the technological conquest of nature, but none so high as the intellectual and spiritual costs of seeing nature as mere material for our manipulation, exploitation and transformation. With the powers of biological engineering now gathering, there will be splendid new opportunities for a similar degradation of our view of man. Indeed, we are already witnessing the erosion of our idea of man as something splendid or divine, as a creature with freedom and dignity. And clearly, if we come to see ourselves as meat, then meat we shall become."

Politics has paved the way for this degradation. Meat we already have become, at Ypres and Verdun, Dresden and Hiroshima, Auschwitz and the Gulag. Is it a coincidence that this century, which is distinguished for science and war and totalitarianism, also is the dawn of the abortion age?

[From the Washington Post, Sept. 27, 1978]

Abortion: What's Wrong With a "Religious" View?

(By George F. Will)

The trial in Brooklyn runs like Tennyson's brook, on and on, as the American Civil Liberties Union and others seek a perverse ruling. It concerns the Hyde Amendment, which narrowly limits Medicaid reimbursement for abortion.

The plaintiffs say the law violates the First Amendment guarantee against "establishment of religion" because it enacts a "religious" view of abortion, and because it was passed as a result of "excessive" religious influence on the legislative process. If successful, the challenge will have a chilling effect, by stigmatizing as constitutionally suspect arguments about abortion (and other matters) that are, or are said to be, religious, and by disadvantaging political efforts by religious groups.

The idea that opposition to public funding of abortion, or to abortion generally, must derive from "religious belief" is preposterous, although perhaps not too preposterous to prevail in some court. Opposition to public funding often rests on the ethics of pluralism: When people are passionately against an optional practice such as nontherapeutic abortion, public institutions should not subsidize the practice.

Pro-abortion lobbies pretend to favor government "neutrality," but their idea of neutral policy is subsidies for abortion. This definition derives from an absurdity, the idea that a right is null unless government subsidies the exercise of it. An even more bizarre fallacy employed by the plaintiffs in this case is the argument that a poor woman whose religion countenances abortion is denied "free exercise of religion" unless government subsidizes her abortion.

Opposition to abortion can rest on utterly secular grounds. It is, after all, a biological fact, not a theological assertion, that a distinctive life with its own genetic imprint begins at conception. The abortion argument concerns when this life should be given "legal personality," the protections accorded "persons." Many who oppose abortion do so not because they have religious certitude but because they are uncertain and believe policy should give the benefit of the doubt to even quite young life.

The sudden enactment of anti-abortion laws in the late 19th century was actually motivated, in part, by anti-Catholic feeling: Protestants hoped that restrictions on abortions would help their birth rate match that of Catholics. The enactment of these laws coincided not with a "religious" movement but with the development of embryology (previously, most pepole had believed that a fetus was not alive until "quickening") and the professionalization of medicine.

The flimsiness of the plaintiffs' argument about the necessarily "religious" nature of opposition to subsidized abortions was apparent when one of their lawyers was driven to define a "religious decision" as one that "inheres in the realm that we call conscience." Things get even muddier when the plaintiffs argue that "excessive" participation by religious groups in the abortion debate has produced a "divisiveness" that is evidence that the Hyde Amendment involves unconstitutional "entanglement" between church and state.

Having asserted, fasely, that religious motives must underline limits on abortion, the plaintiffs assert, sinisterly, that such motives can invalidate an otherwise valid law in certain areas of policy. The areas are those in which "strife" may result from "sectarian competition" to shape policy.

The unsurprising conclusion of such analysis is this: When religiously motivated groups conflict with the ACLU and Planned Parenthood and other pro-abortion groups, the law must take the ACLU-Planned Parenthood side. Otherwise, the law may be unconstitutional because the motives of religious groups who supported it are evidence that it involves "excessive entanglement" between church and state.

In their attempt to sniff out disqualifying motives behind the Hyde Amendment, the plaintiffs have gravely and disapprovingly obtained evidence that many letters to Congress concerning abortion were written on Sunday. An ACLU affidavit reports that Rep. Henry Hyde was observed at a church vigil concerning abortion. ACLU representatives have done a "textual analysis" of Hyde's mail to identify "religious terms" and other alarming language from a list of "key words" (for example, "baby" and "human life"). What a wonderfully appropriate marriage that is between academic and constitutional philistinism.

The arguments of the pro-abortion plaintiffs are ridiculous, but their aim is not amusing. It is to deprive many opponents of the right to seek policies in conformtiy with their convictions. Having struggled to free the Nazis from legal restraints, the ACLU is now seeking to inhibit the involvement of religious groups in public affairs.

[From the Washington Post, Nov. 5, 1981]

ABORTION DOES CAUSE PAIN TO ITS VICTIMS

(By George F. Will)

In the eight years since the Supreme Court nationalized the abortion controversy, one facet of that subject has been neglected: pain. Abortion is painful for the aborted.

The neglect is explainable. To opponents of abortion, death, not pain, is the paramount issue. And proponents of abortion need (emotionally or logically, or both) to deny the possibility of fetal pain.

In its 1973 decision legislating abortion on demand, the Supreme Court announced that fetal life is not alive. At least that is what the court seems to have meant (if it can be said to have meant anything) when it described the fetus as "potential life." Those who support the 1973 decision are committed to the idea that a fetus, being only "potential" life, cannot feel pain, pain being an attribute of actual life.

Thus does a legal absurdity breed a biological falsehood. This intellectual train wreck is the subject of an essay in The Human Life Review by Prof. John Noonan of the University of California (Berkeley) Law School. There are, he notes, four principal means of abortion.

Sharp curettage involves a knife killing the fetus (if the amateur embryologists on the court will allow us to speak of "killing" life that is merely "potential"). In suction curettage, a vacuum pump sucks out the fetus in bits (and a knife cleans out any remnants). In second trimester and later abortions, a saline solution is injected into the amniotic fluid. The salt seems to act as a poison; the skin of the fetus, when delivered, resembles skin soaked in acid. If by accident the solution leaks into the body of the mother, she experiences pain that is described as "severe." The fetus can be in this solution for two hours before its heart (a stubborn bit of "potential" life) stops beating. Alternatively, the mother can be given a dosage of a chemical sufficient to impair the circulation and cardiac functioning of the fetus, which will be delivered dead or dying.

A fetus, like an infant or an animal, has no language in which to express pain. But we infer, and empathize with, the pain of creatures, such as baby seals, which lack language to express pain.

There are uncertainties about the precise points in fetal development at which particular kinds of sensations are experienced. But observations of development and behavior indicate that by the 56th day, a fetus can move. Discomfort may occasion the movement. Tactile stimulation of the mouth produces reflex action about day 59 or 60. By day 77 the fetus develops sensitivity to touch on hands, feet, genital and anal areas, and begins to swallow. Noonan believes that the physiological literature teaches that "beginning with the presence of sense receptors and spinal responses, there is as much reason to believe that the unborn are capable of pain as that they are capable of sensation."

Americans are proud of their humane feelings and are moved by empathy. Thus, we regulate the ways animals can be killed. Certain kinds of traps are banned. Cattle cannot be slaughtered in ways deemed careless about pain. Stray dogs and cats must be killed in certain humane ways.

But no laws regulate the suffering of the aborted. Indeed, Planned Parenthood, the most extreme pro-abortion lobby, won a Supreme Court ruling that it is unconstitutional to ban the saline abortion technique. That's right the court discovered that the "privacy" right to abortion, which right the framers of the Constitution neglected to mention, even confers a right to particular abortion techniques.

Most pro-abortion persons have a deeply felt and understandable need to keep the discussion of abortion as abstract as possible. They become bitter when opponents use photographs to document early fetal development. The sight of something that looks so much like a child complicates the task of trying to believe that there is nothing there but "potential" life. And if fetal pain is acknowledged, America has a problem: its easy conscience about 1.6 million abortions a year depends on the supposition that such pain is impossible.

Magda Denes, in her book, "In Necessity and Sorrow: Life and Death in an Abortion Hospital," brought to her subject not anti-abortion convictions but a reporter's eye for concrete detail. Examining the body of an aborted child, she described the face as showing "the agonized tautness of one forced to die too soon." That is a description to bear in mind this day, as many thousands of abortions occur.

'TRIVIALIZING' ABORTION

(By George F. Will)

America's most triumphant political activists in the 1970s have been those who have produced sweeping changes in abortion laws, changes that have contributed much to the current rate of a million abortions a year. Yet the people who have produced this effect, and who are still working for policy changes that would increase the number of abortions, are interestingly anxious to avoid being called "pro-abortion." They prefer the label "pro-choice."

Political movements always try to justify their programs in terms of the society's fundamental values, and the pretense of a liberal society is that the fundamental value is "freedom of choice." But now a suit challenging one small part of the pro-abortion revolution is also challenging the idea that the revolution is just "pro-choice."

Two Catholic organizations have filed suit challenging the constitutionality of the Pregnancy Discrimination Act. The act requires employers to pay for time taken off by employees to obtain abortions, including abortions that are strictly non-therapeutic. The act also requires employers to pay all medical and hospitalization costs of abortions "where the life of the mother [sic] would be endangered if the fetus were carried to term."

The plaintiffs contend that this violates First Amendment rights. It compels employers to treat abortion as a mere fringe benefit, whereas their religious convictions may be that abortion is grave and abhorrent. It compels employers "to participate in the trivialization" of abortion, and to facilitate it by providing economic incentive for it.

Under the First Amendment's protection of the free "exercise" of religion, the freedom to act on religious beliefs is accorded broad protection. The plaintiffs contend that the new law requires employers "to make public acquiescence in a valuation of human life offensive to their religious convictions. And the law does not settle for passive acquiescence but requires "continuing and active participation in an abhorred practice." This in spite of the fact that the Supreme Court has held:

"Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom to worship."

The court has held that First Amendment rights were violated when children of Jehovah's Witnesses were compelled to salute the flag in school. And when employees were compelled to finance political statements they opposed. And even when New Hampshire compelled a dissenting citizen to display the license-plate slogan "Live Free or Die."

Surely the compulsion to facilitate abortion abridges many Americans' First Amendment rights more seriously than did the law requiring display of New Hampshire's slogan.

The plaintiffs argue that the abortion-funding requirement is even worse than a "passive restraint" on free exercise of religion. A law that threatens a person if he speaks his mind can at least be avoided by not speaking. But the Pregnancy Discrimination Act imposes an affirmative duty that compels employers to act. For those wishing to preserve their integrity, and act in conformity with their religious convictions, not even passivity is an option.

Refusal to comply with the funding requirement would trigger sanctions against employers, including denial of federal and state contracts. This in spite of the court's ruling that "to condition the availability of benefits" open a person's willingness to violate a cardinal principle of religious faith "effectively penalizes" the free exercise of constitutional liberties.

Those who oppose, for example, public funding of abortions have been accused of trying to "make their morality compulsory." But this suit demonstrates that where the freedom of many Americans to choose to act in conformity with their religious convictions conflicts with the goal of making it financially easier for women to choose to have abortions, the law is not just "pro-choice," it is "pro-abortion."

The idea that "freedom of choice" is necessarily neutral as regards social outcomes is the characteristic pretense of liberal societies. But liberal societies do not provide "freedom of choice" without having certain expectations about which choices will be made, and they try to shape choices by shaping attitudes. All societies do this. Only liberal societies pretend to be neutral.

It is a goal, not a collateral effect, of the pro-abortion movement to force people to act upon the assumption that abortion is a triviality. A million abortions a year proves that the movement has achieved its primary goal, which is to transform attitudes. Obviously many people already regard abortion as the birth-control method of first resort, like taking a pill—in short, as a triviality.

CIVIL WAR IN THE PRO-LIFE MOVEMENT?

(By Nick Thimmesch, Los Angeles Times Syndicate)

Washington—As it happens to all spirited, serious movements, dissension, wrangling and name-calling now afflict the Pro-Life legions, and at a time when they are at their greatest strength.

Boxing buffs used to say that some fighters can't stand prosperity. That's also true of the anti-abortion movement.

Pro-Lifers are hurling epithets at each other that the more ardent usually save for pro-abortion zealots, all over the issue of which legal remedy should be followed to stop the killing of 1.5 million unborn children every year.

On one side are backers of Sen. Jesse Helms' Human Life Statute (S. 158) which, in effect, would state that human life begins at conception, and therefore the Supreme Court erred in not conferring personhood on the unborn in the 1974 Roe vs. Wade case. The Helms bill would proclaim that the unborn child, as a "person," is guaranteed the protection of due process under the 14th amendment.

In the other corner are those who support the constitutional amendment (S.J. 110) of Sen. Orrin Hatch, which declares that no right to abortion is conferred by the Constitution. It would give Congress and state legislatures the power to pass laws restricting abortion. It would also affirm a federal standard for protection of the unborn.

Helms' bill was stuck in the Judiciary Committee, so in mid-autumn he reintroduced it as a rider, hoping to circumvent the committee and get it to a quick floor vote this session. Hatch, as chairman of the Judiciary Subcommittee on the Constitution, has a tactical advantage over Helms, foxy as the North Carolina senator is.

Helms argues that a simple majority (no more than 51 votes) can make his bill law, where Hatch needs two-thirds of those present and voting (up to 67) for his amendment to succeed in the Senate. The same ratios prevail in the House as well.

But a Helms law would be subject to rejection by the courts. It is likely that the federal judiciary, including the Supreme Court, would rule that Congress cannot make such sweeping value judgments as found in the Helms bill. A constitutional amendment like Hatch's is beyond the reach of the courts. The

Hatch amendment is predicated on the notion that the people—through Congress and the state legislatures—can be trusted more than the federal courts on so vital a question as protection of the unborn.

Moreover, there is a long-range strategy in the Hatch amendment, which its supporters claim makes it solid, and which pro-abortion advocates regard as insidious. Simply put, once the Hatch amendment is ratified by two-thirds of the states, a second constitutional amendment would be proposed. This one would establish personhood for the unborn and put in the Constitution the mandatory protection which presumably Congress and the states would pass after Hatch's amendment was the law of the land.

The thinking is that the Hatch amendment, once ratified, would change public opinion on abortion from confusion and division to national resolution against the grisly business. Such gradualism has served many social causes in America, including those of children, blacks, other minorities and women.

For this reason, the National Conference of Catholic Bishops endorsed the Hatch amendment, startling some militant Pro-Life leaders and causing dismay among other religious groups on the Pro-Life side, particularly fundamentalist Protestants.

Archbishop John R. Roach of Minnesota, speaking for the bishops, acknowledged other "views," but said the bishops' understanding of national attitudes and belief in the democratic process "convinces us that this strategy for returning the abortion controversy to the legislative arena" is the best solution in the "present situation of abortion on demand."

In other words, blacks had to be protected against lynching before they won the right to eat at lunch counters in the South. But Pro-Life Jacobins cry that the Hatch way is a "sellout" and unleash fierce rhetoric against the bishops and anybody else who gets in their way.

Judie Brown of the American Life Lobby agreed that it was "absolutely true" to characterize the Hatch amendment as "destructive * * * cowardly * * * anti-life" and its supporters as "stubborn and stupid."

The "Life Letter" of the Ad Hoc Committee in Defense of Life, tried to explain the bishops' stand as that of the "R.C. Washington apparat" (translation: Roman Catholic Washington apparatus), "notoriously ultra-liberal" and "dismayed by the Reagan victory" and the "wipeout of liberal Dem senators, who, pro-aborts all, rendered unto Cesar (Chavez) support of so-called social justice spending." (NOTE: This graph is REALLY cq)

Another official of a Pro-Life organization was quoted as saying the Bishops were trading off the abortion issue for tuition tax credit legislation aiding Catholic schools. If this isn't libel, it is vicious slander, but it reflects how deep feelings run in the pro-life movement.

Such Catholic baiting is not new; it has been the national pastime at many junctures in our history. Thus suspicion is of a papal plot, or at least a bishops' conspiracy behind thick walls. Actually the American hierarchy today is an open-minded bunch, indeed, in terms of gathering souls for a good cause. The bishops welcome a convert to the Pro-Life cause like, say, Dr. Bernard Nathanson, a one-time volume abortionist, and secular groups like Democrats for Life, Libertarians for Life, Feminists for Life, Pro-Lifers for Survival (opposed to abortion and nuclear arms alike).

These days, a moderate soul firmly committed to the protection of the unborn runs the risk of being poked in the ribs with a coathanger wielded by some pro-abortion fanatic or being hit in the face by a bunch of faded, stinking roses from some nut on the other side.

Ah, such is Pro-Life.

[From the Christian Science Monitor, May 18, 1982]

LEAVE THE ABORTION COMPROMISE ALONE

(By Thomas D. Rowe, Jr.[1])

The abortion controversy has suffered from too much emphasis on ends, almost to the exclusion of thinking about what means are appropriate. Legal compulsion—however commonly used in other contexts—is a means that *both* sides of the abortion controversy should forgo, at least as to pre-viability abortions. In a pluralistic society like America's, when consensus is utterly lacking on a question of personal morality, no group ought to impose its views on others by law.

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[1] Thomas D. Rowe, Jr., is professor of law at Duke University, N.C.

Whatever the convictions of the foes of abortion, it is different from murder in one crucial respect: much of our society, probably a large majority and including many major religious groups greatly concerned with moral issues, simply does not agree with the equation of abortion with murder or accept that it should be banned. Even for one who believes deeply that abortion is wrong, it should not automatically follow that society ought to write that view into its law. On all sides, some respect is due to widely and deeply held contrary beliefs—an idea that cuts both ways, for the insistence of those who oppose abortion on not being forced to pay for them warrants respect as well.

However those against abortion may feel about U.S. law as it stands, it doesn't impose anyone else's view on them. The law doesn't *make* anyone have an abortion: that certainly would amount to an imposition of the worst sort. While the idea of compulsory abortion is mostly hypothetical in present-day America, it does illustrate that those favoring free choice are more in the middle than at one extreme.

The thought also leads to a further reason why those opposing abortion should deny themselves the weapon of legal compulsion: The power that can ban an abortion is the power that can require one, and we should not want our government doing either.

Legal compulsion can be a two-edged sword, one best kept sheathed on matters so intimate and divisive as abortion. If there ever were a law in this country trying to compel some abortions, the outraged response of many would likely be not just that the law was utterly wrong but that the state had no business dictating that sort of decision.

True conservatives should be wary of associating themselves with a cause that would legitimate the use of Legal compulsion about abortion, for the likely reaction to the idea of compulsory abortion illustrates that there is something about the decision whether to carry a pregnancy to term that the state should not invade. Whatever one thinks of the soundness of the Supreme Court's abortion decisions as constitutional law, they have the great virtue of keeping us from doing that sort of thing to each other.

All this may sound like a fancy way of endorsing the slogan, "Keep your laws off my body." It does reach the same conclusion, but the reasons why that claim seems justified go beyond selfish sentiment—and have implications that will not be completely welcome in the pro-choice camp. If one side wants the other to keep its laws off women's bodies, it should at least be willing to keep its own laws off its adversaries' wallets. Such respect for opposing conscientious conviction has been all too lacking in the zealous crossfire, but it seems essential if the abortion issue is ever to cease being an open wound in our politics. And willingness to extend such respect implies what federal law, however much by accident we may have arrived at it, now provides: no ban on abortions but no tax dollars for them either.

Finally, acceptance of the legal status quo need not even mean acquiescing in what for each side is hardest to accept in the present situation—continuation of legalized murder from the anti-abortion point of view, and discrimination against the poor for those who favor freedom of choice. For as the law excludes compulsion, it leaves other means open to both sides.

The pro-life forces remain entirely free, as they should be, to use moral argument and even enforcement of religious law through religious institutions to discourage others from having abortions, and to remedy the present inadequacy of support for alternatives to abortion.

By the same token, those who favor freedom of choice can support their belief with private efforts to make abortions available or unnecessary in the first place. Indeed, what should go with pluralistic respect for opposing conviction is acceptance of an obligation for voluntary action, such as giving to adoption programs or the new Abortion Fund. Otherwise all the alternatives, such as contraception, adoption, and abortion, will be—as Justice Robert Jackson once said in a different context—"a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."

The idea of compromise may now seem repugnant to partisans on both sides of the abortion controversy. But compromise by refraining from the use of legal compulsion—without abandoning principle or other lawful means to pursue our different goal—may be the only way out of the abortion thicket. Our law on abortion, more by chance than by design, has pretty much gotten to the point of abandoning compulsion. That is where it should stay.

[From the New York Times, Oct. 12, 1981]

CONSERVATISM, PRIVACY AND ABORTION

Pity the New Right. It finally gets its man in the White House and he appoints a Supreme Court Justice with moderate views on abortion. Even worse, he seems to care more about the economy and Awacs than a constitutional ban on abortion.

All this has forced the foes of abortion to do some backing up. What they want most is a constitutional amendment simply banning abortion. But Congress is not receptive. Nor will Congress proceed any further with the human life bill, which would end abortion without an amendment by defining conception as the start of human life and allowing the states to strike down abortion as murder.

Now there is a more subtle idea, urged by Senator Orrin Hatch, Utah Republican, at hearings last week. It's an amendment that would end any constitutional protection of abortion, including the right to privacy delineated by the Supreme Court in 1973. The idea is to give the states and Congress the power to limit abortion—but no state could have a looser standard than one set by Congress.

That may sound like only a states' rights amendment, but the real purpose is clear when one focuses on this Congressional override. The Hatch proposal is yet another effort to overthrow the Supreme Court's 1973 decision.

Constitutional amendments can be written to take away individual liberties rather than to guarantee them—though that has happened only once. Prohibition, it was called, and it did more to breed disrespect for law than temperance and was ultimately repealed. A similar fate, we think, awaits the constitutional tampering that Senator Hatch proposes, if only for the most practical of reasons.

Abortions cannot be stopped by law; only legal abortions can be. To forbid abortion is to risk forcing women back to the sad era before 1973 when an unwanted pregnancy was synonymous with exploitation and fear. Rich women would once again go abroad for safe abortions; poor women would be left to risk health, even life, with illegal practitioners.

That is hardly enlightened social policy. It may not even be good politics. Polls show wide support for the Supreme Court's defense of a woman's right to an abortion early in pregnancy without state interference. Such privacy is an aspect of personal liberty that no government should invade. It's akin to the right to marry and to raise children free from political intrusion.

Senator Hatch contends that his amendment would help calm the nation's jangled nerves on the abortion issue. It's hard to see how. His proposal would invite every national, state and local politician into a decision that is already painful enough when left, as it should be, to a woman and her doctor.

What strange proposals these are, emanating from the conservatives who dominate Washington now, pledged to restrain governmental overreaching. If they are sincere, let them stop talking about any intrusive constitutional amendment and fight instead to defend the privacy that the Supreme Court defined in 1973. That would reflect both true conservatism and true compassion.

[From the Washington Post, Oct. 7, 1981]

LIBERTY

(By Judy Mann)

Sen. Orrin Hatch, the Mormon senator from the great state of Utah, began hearings Monday on his constitutional amendment to ban abortions with criticism of the Supreme Court's 1973 decision legalizing abortion as the product of the justices' personal beliefs. Then he promptly disclosed his own personal beliefs, which, he said, legitimize his attempts to grant fetuses the constitutional protections granted people.

"Quite simply," he said, "I believe that abortion, under virtually all circumstances, is wrong because it involves the taking of a human life. This is my own moral, ethical and—dare I say it—religious perspective."

Hatch's proposed amendment is an insidious appeal to the states' rights mood of members of Congress who are tired of battling over abortion. The amendment states that "a right to an abortion is not secured by this Constitution. The Congress and the several states shall have the concurrent power to restrict and prohibit abortions: provided, that a law of a state which is more restrictive than a law of Congress shall govern."

Unlike Sen. John East (R-N.C.), who stacked the hearings on his human life bill with a self-defeating parade of antiabortion witnesses, Sen. Hatch is angling for respectability. For his first day of hearings he invited as expert witnesses John T. Noonan Jr., a law professor at the University of California at Berkeley, and Laurence H. Tribe, a law professor at Harvard. Sens. Patrick Leahy (D-Vt.), and Robert Packwood (R-Ore.) also testified. It was a morning for history lessons and for putting the abortion debate back in perspective.

"Amendments to the Constitution have generally reflected the outcome of issues resolved by the American people, sometimes after generations of debate and deep division of opinion," said Leahy, who is personally opposed to abortion. * * * where we amended the Constitution without a national meeting of the minds, we were forced to retract the amendment, and only after devastating effects on the society . . . Constitutional amendments memorialize consensus. They do not create it."

Packwood reached into English history and the time of Oliver Cromwell, leader of the Puritans, and his New Model Army, which defeated the Royalist forces in the English Civil War. Quoting Churchill's "History of the English Speaking People," Packwood said, "It was the triumph of some 20,000 resolute, ruthless, disciplined, military fanatics over all that England has ever willed or ever wished."

"Always," said Packwood, "from the Magna Carta through the English Bill of Rights through our Bill of Rights through the Civil War amendments to date, the history of liberty has been the continued expansion of personal freedom and the continued limitation on the powers of government."

Abortion existed at the time of the framing of the Constitution, but it was not a procedure that framers saw a need to address in that document, said Packwood. Still, it is a freedom as protected as any other. Would the committee, he asked, favor an amendment allowing the states to restrict freedom of speech?

Hatch, who has set six more days of hearings on his bill, is defending his effort by saying that deep divisions still exist in the country over abortion. But those divisions also seem to be a matter of his personal belief.

According to the latest Associated Press-NBC poll, 78 percent of the people interviewed believe abortion should be left up to the woman and her physician. Some 49 percent of those surveyed believe abortion is wrong, but two out of five of them said that it should not be illegal. Two-thirds of all those polled are against a consistitutional amendment banning abortion.

What deep division is arising in the country over abortion is arising because people like Orrin Hatch are seeking to impose their moral and ethical and religious views on the rest of us. Packwood called them modern-day Puritans and warned they would not stop until they have restricted all liberties with which they disagree.

Hatch criticized the Supreme Court justices who upheld the right of a woman to obtain an abortion, saying they acted more out of personal belief than constitutional reasoning. But, in fact, the justices grounded their reasoning in the privacy guaranteed by the Constitution. That Hatch can find no similar protections for his beliefs is evidenced by the fact that he has to try to change the Constitution in order to prevail.

And in so doing, he is using the Senate as his pulpit, neatly forgeting the separation of state and religion that is in the Constitution. While his goal may be less than worthy, his first day of hearings have provided an important reminder that the core of the abortion debate is not whether abortion is right or wrong, but whether we as a people, are going to be vanquished by modern Puritans and allow government to take away our personal freedoms.

[From the New York Times, Aug. 18, 1980]

ABORTION POLL: NOT CLEAR-CUT

WORDING OF A QUESTION MAKES A BIG DIFFERENCE

(By E. J. Dionne Jr., Special to The New York Times)

What do the American people think about abortion? It depends on how you ask them the question.

The New York Times/CBS News Poll conducted earlier this month asked a random sample of Americans about their views of abortion in several different ways, and obtained several results. The experiment suggested that not all polling questions are created equal.

First, respondents were asked, "Do you think there should be an amendment to the Constitution prohibiting abortions, or shouldn't there be such an amendment?"

The respondents were solidly opposed to such an amendment. Only 29 percent of those surveyed favor the proposal, while 62 percent were opposed and the rest were uncertain.

Later, the same people were asked a different question to measure attitudes on the same issue. It is the preferred question of the anti-abortion movement, and the results indicate why this group likes it so much.

The question read: "Do you believe there should be an amendment to the Constitution protecting the life of the unborn child, or shouldn't there be such an amendment?"

The result: Fifty percent in favor, 39 percent opposed, the rest undecided.

About one-fifth of those polled shifted position when the second question was posed. Fully one-third of those who opposed the amendment when it was presented as "prohibiting abortions" supported it when it was presented as "protecting the life of the unborn child."

QUESTION OF WHAT POLLS MEAN

Can one make any sense of the polls, with results like these?

Pollsters say the answer is yes, providing that people realize how sensitive public opinion can be and how blunt the instruments used to measure it. This is especially true on issues where people are uncertain or have mixed feelings.

"On the eve of an autumn that is going to be filled with campaign rhetoric, we find the public is vulnerable to symbol-mongering, which some may care to call leadership," said Dr. Michael R. Kagay, a public opinion specialist at Princeton University.

There is little doubt that most Americans believe abortion should be permitted under some circumstances. Surveys over the years have shown that especially in cases of rape or incest, Americans overwhelmingly favor the right of a woman to have an abortion. In other situations, however, they often take a less favorable view.

What does seem to be the case is that among those who have a clear view—those who took a consistent position on the anti-abortion amendment however the question was phrased—those opposing the measure had the edge.

Over all, 36 percent of the respondents consistently opposed the amendment, while 26 percent consistently favored it. The rest either switched from one side to the other or were undecided on one or obth phrasings of the question. Those with lower levels of education tended to be more easily swayed by question wording, but nearly one in six among the well-educated respondents were also influenced by wording.

On another question in the same poll, the anti-abortion respondents were again in the minority.

Those polled were asked: "If a woman wants to have an abortion and her doctor agrees to it, should she be allowed to have an abortion or not?"

Sixty-two percent said a woman should be allowed to have an abortion; 15 percent said it depended on the circumstances; only 19 percent said a woman should not be allowed to have an abortion.

Supporters of the anti-abortion movement do seem more likely to make the abortion issue a central concern in choosing candidates. About one-third of those who consistently favored the anti-abortion amendment said abortion views would affect their vote this fall, compared with just under one-fifth of those who opposed the amendment.

Few results raise more deeply rooted and personal feelings than abortion, and the polling results suggest that Americans have views that can be measured, but not neatly stereotyped or pigeonholed.

EXCLUSIVE FAMILY CIRCLE SURVEY

HOW WOMEN FEEL ABOUT ABORTION

Last February we asked our readers to tell us how they feel about abortion. The response was unprecedented in magazine history—over 250,000 Family Circle readers took the time to fill out and mail back our two-page questionnaire. In addition, thousands enclosed long, thoughtful letters. Clearly, women feel abortion is one of the most important issues of our time.

By MARGARET JAWORSKI

Though there were wide variations among respondents of different political attitudes and religious beliefs, the majority of women who answered our survey—more than three out of five, or 62.1%—support a woman's right to have an abortion if she wants one.

- ***Slightly fewer (60.6%) favor the 1973 Supreme Court decision which legalized abortion. Of the 38.2% who oppose the Supreme Court decision, more than half (52.2%) favor abortion under special circumstances: "Danger to the life of the mother" was cited by 84.6%; rape by 48.8%; incest by 48.4%; genetic defects by 26.7%. "Psychological damage to the mother" was cited by only 8.3%.***
- ***Two-thirds (66%) oppose the passage of a constitutional amendment that would make abortion illegal.***
- ***Over one-half (56.1%) of the respondents support abortion on demand until the end of the third month of pregnancy.***
- ***The influence of religious beliefs was most evident in the answers to the question of when life begins: While exactly half of the total feel that life begins "at conception," this view is held by 72.6% of the Catholics, 41.7% of the Protestants, and 16.4% of the Jewish respondents.***
- ***Seven out of 10 Family Circle respondents said they would change their vote if they disagreed with a candidate's stand on abortion.***
- ***Approximately one-fourth felt government should subsidize abortion at the Federal, state or local levels.***
- ***Three out of five (62.2%) disagreed with the statement, "Abortion availability has contributed to teenage promiscuity."***
- ***Sex education from kindergarten through grade six is favored by 61.2%, and 83.6% favor it in grades seven through 12.***
- ***By regional breakdown, "pro choice" sentiment is highest in the Northeast (69.6%) and West (69.1%), dropping to 64% in the South and 51.3% in the North Central region.***
- ***Women who work outside the home favor legal abortion to a greater degree than those not employed outside the home (68% compared to 53%).***

Nearly a decade has passed since the 1973 Supreme Court decision legalized abortion, but the furor continues. Indeed, few issues in recent history have stirred such intense emotions or such heated debates. "I can think of no other issue—not the ERA, not even the threat of nuclear war—which rouses such anger or passion," one woman writes. Another says, "In my family there are women who support choice and women who are against choice. We have tacitly agreed to no longer discuss the question. If, in my family, which is relatively close and communicative, we can't even *speak* to each other about the issue, how can it ever be resolved? I do not think my family is an exception either."

More than any other women's issue, abortion has created a seemingly irreconcilable schism. According to our mail, this division is further aggravated by the "labels that both sides throw at each other." As one woman writes, "To suggest that there might be merit in freedom of choice is to immediately brand yourself a murderer." Another says, "I have spoken out against those practices which degrade women—prostitution, pornography, rape. I have also tried to support my sisters in their striving for equality and, as a mother, to teach my daughters to be proud of their budding womanhood. All this, and still mainline feminists would label me anti-woman—because I oppose abortion on demand."

Who Answered the Questionnaire?

The women who answered the questionnaire come from every part of the country. (Their answers were processed and analyzed by Mark Clements Research, Inc., in New York City, from a representative sample of 5,000. No photocopies

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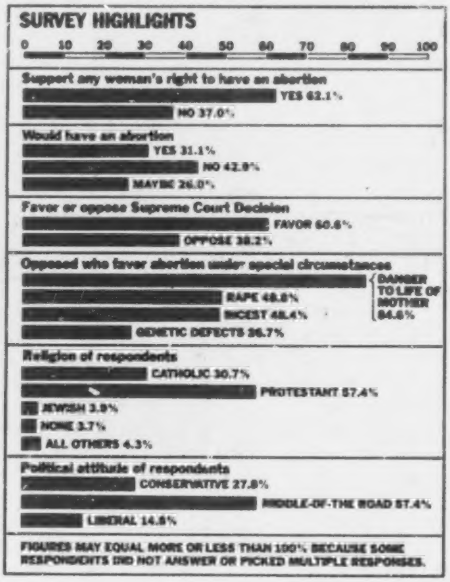

FIGURES MAY EQUAL MORE OR LESS THAN 100% BECAUSE SOME RESPONDENTS DID NOT ANSWER OR PICKED MULTIPLE RESPONSES.

of the questionnaire were tabulated.)* Over three-fourths are married (10% are single and 11% widowed or divorced). Slightly more than one-third work full-time outside the home and 21.8% work part-time. Half have children under 18. What the respondents wrote shows that regardless of which side they are on, women's feelings on abortion are influenced by many factors, including religious beliefs, political attitudes and personal experience. Three out of four say they know someone—a friend, relative or acquaintance—who had an abortion. And 16.3% say they had the procedure themselves, their letters describing painful memories of illegal abortions. Many letters began with the words, "I want to share a secret with you." Some regret their decision to have an abortion; others are convinced they made the right choice. Many were ambivalent. Nearly all stress that the decision was "one of the most difficult I've ever made," and one "fraught with emotional and psychological turmoil."

Pro and Con

Many letters separate personal feelings from the legal aspects of abortion. One woman writes, "I am not 'pro-abortion'...I am pro-choice and there is a big difference between the two terms. Having an abortion is not a quick, selfish decision, it is a very human choice that involves just as much of a person's heart and mind as choosing to have a child does." Another woman comments, " I do not believe that abortion is ever an ideal or positive moral act. If we lived in an ideal world—one in which all of us were loved and supported whatever the state of our physical, emotional, financial or spiritual health—then I would not support abortion. But we live in a world which is far from ideal. Women, especially very young women, often become pregnant through ignorance or violence or accident. Most of them still bear the burden of rearing children, whether or not they are equipped for the job and whether or not they have the support they need." Another writes, "Pro-choice means supporting the right to choose. It does not mean that I think abortion is always morally justifiable."

Opponents of abortion write, "So much is said for the freedom of choice and control over one's body. Except for victims of rape or incest, every woman has freedom to choose whether or not to engage in intercourse and has control over her body by practicing birth control. Why is everyone so concerned about the woman's freedoms and yet so unconcerned about the rights of the unborn child?" Another says, "I can, in a way, sympathize with those who earnestly work for abortion on demand. Once I was in the same position, believing all of the pro-abortion arguments that came my way. But when I discovered what abortion really is—the painful, brutal slaughter of helpless innocents—I changed my ways instantly."

Yet even among those who oppose legalized abortion, the majority would favor terminating a pregnancy when the life of the mother is in danger or when the pregnancy results from incest or rape. In addition, although 54.7% of the respondents feel that government should not subsidize abortion, a substantial number of letters favor subsidy for rape or incest victims.

Should the government play a role in the decision-making process? Three out of five FAMILY CIRCLE respondents (64.9%) say NO. Echoing a resentment expressed by many, one woman writes, "Why should a bunch of male legislators be telling women what to do?" Another comments, "If men were the ones who had to go through nine months of pregnancy, if they had to worry about getting pregnant every time they had intercourse, I dare say abortion would not only stay legal, it would be free." Still another says, "Mainly, I am opposed to government intervention in the bedroom. I believe abortion is a decision to be made with much prayer and thought. The parties which should aid in this decision are God, the woman, the man and the doctor in that order."

When Does Life Begin?

By far the most emotionally charged letters deal with the question of when life begins. On one hand, a biologist writes, "...it is ridiculous to believe that life begins at conception. Take it one step further. Every woman loses an egg during each menstrual cycle. Does this mean we always need to be pregnant to avoid wasting 'life'?" Another comments, "No one can argue that chemical, or biological, life begins at conception. The controversy is over when the fetus becomes human."

The viewpoint on the other side is equally vehement. "Whether the baby is two days 'along' or two weeks old, it is just as much a human being as an adolescent or an adult. These words just describe age, not degree of humanness. Abortion is nothing less than murder."

A number of women complained,"You did not include ability to survive outside the womb" as a possible response to the question of when life begins. Most of those who specified "ability to survive outside the womb" as the criterion for life agree that it happens "some time after the first three months of pregnancy." This may have been a reason why 56.1% of the respondents endorse abortion on demand until the end of the third month of pregnancy.

Suggestions and Alternatives

Many readers favor "unbiased, objective" counseling for women considering abortion. "These women should know what their options are, and that there are people willing to help and couples waiting to adopt if they decide to go through with the pregnancy." Another comments, "I believe all of us have a responsibility to think about the attitudes that make a woman feel she must sacrifice an unborn child in order to lead a normal life. If there were a little more compassion, and a little less judgment, there wouldn't be as many abortions."

The adoption alternative was cited frequently by those who oppose abortion. A woman from California writes, "Speaking for hundreds of thousands of adoptive parents and couples waiting to adopt, I cannot see how a woman could be so selfish, so unwilling to sacrifice a few months of her life to give life. I thank God every day that my adopted son's mother valued his life from the moment of conception." But others say they are uncertain as to whether or not adoption really is an alternative. "I hear people say there are hundreds of couples waiting to adopt children. But if this is true why are there so many unwanted kids living in homes and institutions?" And while 60.4% of the women who answered our survey agree with the statement, "Abortion availability has reduced the number of unwanted children who are likely to end up abused or neglected," many write, "It seems to me that I read and hear stories about abuse and neglect more now than I did before abortion was legalized." Some criticize Right-to-Life groups. A social worker from Pennsylvania writes, "Why don't these Right-to-Lifers spend their time and money helping the children who are already alive? They cry out loudly for the unborn, but what are they doing for children who are suffering right now?" But Right-to-Life respondents have another perspective: "Every day I read a story about child abuse," one writes, "but those who argue that abortion helps remedy this situation are wrong. We cannot correct one evil by committing another."

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* In addition a state-by-state analysis of the question, "Do you feel any woman should have the right to have an abortion if she wants one?" was made on over 50,000 responses. This additional validation shows that the responses are almost identical by region.

Areas of Agreement

Though the areas of disagreement are numerous, on some points virtually everyone agrees. Fully 78.3% of the women who answered our questionnaire agree that "Some women misuse abortion as a form of birth control." A frequent comment: "With all the methods of birth control now available I can't understand any woman terminating more than one pregnancy." Many suggest a limit on the number of abortions a woman can have, "At some point you have to say, 'enough.'" Others write: "Excesses and abuses will occur no matter what is legislated. But must we punish everyone because of a few?"

The need for education was another area that nearly everyone agrees on. Three out of five respondents favor sex education in elementary school and 83.6% favor it in grades seven through 12. A common comment: "Ideally parents should teach their children about sex. But in many families that subject is discussed only superficially; in some it is simply taboo. When the family cannot provide guidance, it's better for our children to get it in the schools rather than from equally uninformed or misinformed friends."

A majority of readers (66%) disagree that "Abortion availability has contributed to teenage promiscuity." Instead readers most often attribute the rise in teenage—and adult—sexual activity to the way sex is presented in the media and the breakdown of traditional values.

Other Concerns

Would outlawing abortion have any impact on what many women perceive to be a "declining standard of morality"? Some readers feel that abortion "makes it easier for women to engage in irresponsibile sexual activity." Another believes that, "Abortion is…a capitulation to masculine values. A woman who favors abortion proclaims that the way to be equal with men is to be like men—that is, free to engage in sexual activity without consequence or responsibility." But others agree with the viewpoint of one 65-year-old woman. "Abortion wasn't legal in my day," she writes. "But that didn't stop woman from having premarital sex; nor did it stop them from having abortions. Morals and actions haven't really changed that much, you just hear more about what goes on."

Since 1973, some 12 million American women have had abortions. Whether or not this figure represents a dramatic increase is difficult to ascertain. No one knows for sure how many women used to have illegal— and unreported— abortions. But, as one woman who had an illegal abortion in 1946 at the age of 14 writes, "Women who are desperate to obtain an abortion will find a way to get it done. Making abortion illegal will never stop a woman from getting one. It will only make the procedure unsafe."

Is There a Solution?

The extremist views on abortion are by far the most publicized. Yet, as the letters and survey findings indicate, the majority of women who responded are neither completely for nor completely against abortion in all circumstances. There *are* divergent viewpoints, but there are also areas of agreement. Clearly, there is no solution that will satisfy everyone. But it is also clear that a workable solution is possible if women really *listen* to each other. As one woman writes, "Abortion is a woman's issue, and women should stop judging each other's beliefs and start working together to find a solution." Another asks, "Wouldn't it be fantastic if we could concentrate all our energies on preventing unwanted pregnancies instead of preventing wanted abortions?"

One woman sums it up, "We must stop dealing with abortion as an emotional issue. We must learn to handle it rationally and logically because, like it or not, abortion will not 'go away.'"

At present the future of legalized abortion is uncertain. Several versions of anti-abortion amendments are pending in Congress. The "Human Life Federalism Amendment" sponsored by Senator Orrin Hatch (R-Utah) may reach the Senate floor sometime this year. Passage of this amendment would overrule the Supreme Court and would allow the Federal and state governments to make their own laws concerning abortion. Abortion could then be outlawed or severely restricted by legislators.

Another proposal named the "Human Life Statute" co-sponsored by Senator Jesse Helms (R-N.C.) and Congressman Henry Hyde (R-Ill.) would extend the definition of "person" in the Fourteenth Amendment to include a fetus from the moment of conception. If this proposal were to pass, any woman who has an abortion and any doctor who performs one could be prosecuted for murder.

We will send the results of our survey to some of the legislators who will be voting on these amendments. In a future issue of FAMILY CIRCLE we will tell you how they responded. ■

Due to the tremendous amount of mail we received, FAMILY CIRCLE regrets that we cannot answer letters personally.

UNITED STATES CATHOLIC CONFERENCE

NEWS

DATE: September 3, 1982

FRCM: Russell Shaw

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FOR IMMEDIATE RELEASE

PRO-LIFE OFFICIAL HITS BIAS IN ABORTION POLL

WASHINGTON--The director of the Catholic bishops' Office for Pro-Life Activities said results of a *Family Circle* poll on abortion "again raise the issue of bias and manipulation in polls dealing with this subject."

Father Edward Bryce said the survey, results of which are published in the magazine's September 16 issue, reflects "deficiencies" in regard to sponsorship and format, questions asked, contradiction of more reputable polls, and its own "self-contradictory" results.

Following is his statement:

> Results of a readership survey on abortion in the September 16 *Family Circle* magazine again raise the issue of bias and manipulation in polls dealing with this subject. The deficiencies of this particular survey are evident from at least four perspectives.
>
> (1) *Sponsorship and Format of the Survey*. The editorial bias of the poll's sponsors was evident long before the poll appeared in the magazine's February issue. The survey seems to have been familiar well in advance to the Planned Parenthood Federation of America, the most powerful pro-abortion advocacy group in the United States. Planned Parenthood's Washington office sent a memorandum to all PPFA affiliates last November announcing that *Family Circle* would publish a pro-abortion opinion piece by Katherine Hepburn, and would follow with an opinion survey for its readers. Abortion advocates were urged to fill *Family Circle's* mailbox with letters of appreciation and with completed survey forms.

Ms. Hepburn's article appeared in the January 12 issue, complete with a blurb on the magazine's cover; no alternative viewpoint was presented. This article was a grossly distorted view of the abortion debate whose evident intent was to "soften up" the Family Circle readership. The opinion survey then appeared on two pages in the February 2 issue, without introduction and without any indication on the magazine cover that it even existed -- as if to hide the poll from anyone who had not been forewarned by PPFA or by the Hepburn article. Nothing more was heard of the survey until now -- immediately before the U.S. Senate resumes debate on abortion.

Of 250,000 reported responses, only 5,000 were completely tabulated. At the time of the survey, some individuals opposed to abortion called Family Circle to see if photocopies of the survey would be accepted since they had friends or relatives who wanted to reply but did not have their own copy of the magazine. They were assured that this was acceptable, but photocopies were excluded when results were tallied.

(2) Misleading and Biased Questions. The survey contained several biased questions of the sort that public opinion experts in this area of research have repeatedly criticized. For example, respondents were asked whether "any woman" should have a right to an abortion, without mention of stage or circumstances and without explanation as to whether "any" meant "all" women or "some" women. The poll asked whether respondents support or oppose the Supreme Court's abortion decisions, without explaining their radical nature. (Earlier, the Hepburn article seemed to imply that these decisions had only legalized abortion in certain "hard cases", when in fact they legalized abortion on demand for any reason at all). Those who oppose these decisions were asked under which of various circumstances they would "favor" abortion, and no space was available for "none of the above." But those who claimed to support the decisions were not asked whether they oppose abortion under any circumstances.

Use was also made of "leading" questions, such as, "Do you feel the Government should not have the power to pass legislation in an area as personal as abortion?" It was not explained why Supreme Court judges should be considered more respectful of "personal" areas than legislators are. The entire survey was translated into the realm of personal "feeling," and respondents were even asked when they "feel" human life begins; this biases the survey from the outset by suggesting that there are no objective answers to these questions and, therefore, no objective basis for legislation, but only "personal" or arbitrary whims. The only question about a constitutional amendment deals with one "making abortion illegal" -- apparently a deliberate smokescreen, since the only amendment moving forward in Congress either now or last February simply allows legislators to set policy on abortion and does not make any abortions illegal.

(3) Contradiction of More Reputable Polls. Dozens of major public opinion polls conducted by groups such as Gallup, Harris, and the National Opinion Research Center show a consistent pattern of attitudes on abortion. About one quarter of those polled support unrestricted abortion; a comparable number oppose all abortions; and

the "middle majority" wants abortion to be legal only under certain rare circumstances. This pattern has been amazingly consistent over the past ten years. The "hard cases" in question are so rare that a law reflecting majority opinion would ban over 90% of the abortions currently performed. Polling experts such as Judith Blake and Raymond Adamek have shown that even the group fully supporting legalized abortion quickly dwindles when one mentions abortions after the first three months, abortion without parental consent, public funding of abortion, and so on. The results of such studies have been ably summarized in the Senate Judiciary Committee's official report on the Hatch Human Life Federalism Amendment.

In some cases, the Family Circle poll asked biased questions that result in contradictions with better-established survey results; more often it simply failed to ask questions that would have poked holes in the image of popular support for abortion.

Symptomatic of the obvious self-selection among respondents is the answer to the question whether a candidate's position on abortion would determine one's vote in an election. Family Circle received a 70% affirmative response; other recent polls, such as the one conducted by the Washington Post and ABC News last June, have generally received a 10% affirmative response or lower, with anti-abortion "one-issue" voters outnumbering pro-abortion "one-issue" voters almost two-to-one. Family Circle apparently has a totally unrepresentative percentage of abortion activists in its sample.

(4) Self-Contradictory. This poll's use of misleading and biased questions, and its manipulation of public misunderstanding concerning present abortion policies, is most evident in the contradictory responses within the poll itself. For example, 62.1% of those surveyed claimed to support a women's right to an abortion if she wants one, and 60.6% claimed to favor the Supreme Court's 1973 abortion decisions; but only 56.1% supported abortion on demand up to the third month of pregnancy. Respondents were apparently unaware that the Supreme Court's decisions had the practical effect of legalizing abortion for any reason throughout the nine months of pregnancy -- a fact that has now been officially recognized in legislative reports of the U.S. Senate and acknowledged even by the pro-abortion New York Times, owner of Family Circle. As mentioned above, this feature of the Supreme Court's abortion decisions was studiously avoided in the Hepburn article which preceded the survey.

Results of some segments of the poll may remain unknown, since Family Circle chose to publish only what it considered "highlights." It would be interesting, for instance, to see how many respondents agreed with the Supreme Court's judgment that, at least so far as the law is concerned, actual human life should not be recognized to exist until after the moment of birth. But the published responses are enough to show that one must look elsewhere for an objective analysis.

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X,A,AB,EDP

(From DEMOGRAPHY, Published by Population Association of America
Vol. 18, No. 3--August 1981

NEGATIVISM, EQUIVOCATION, AND WOBBLY ASSENT: PUBLIC "SUPPORT" FOR THE PROCHOICE PLATFORM ON ABORTION

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Abstract—Although disapproval of all justifications for abortion is rare in the United States, our analysis of numerous surveys taken in the 1960s and 1970s shows that support for the full prochoice platform is also rare. This means that respondents who endorse some justifications for abortion and reject others typically constitute about 50 percent of these samples. If forced to choose politically between polar positions, would these people be more likely to side with a positive or a negative extreme? Using Multiple Classification Analysis as a form of discriminant analysis, we examine whether people who appear to form a "middle" group actually are closer in their characteristics to those who are positive, or to those who are negative. Finally, we test to see whether those respondents who endorse all four justifications for abortion (health, child defect, financial stress, and elective abortion) also endorse additional prochoice positions, such as government payments for abortion, abortion without the husband's or the parent's consent, and abortion after the first trimester.

Since the 1973 Supreme Court decisions on abortion, the "prochoice" movement in the United States has developed a major platform regarding liberalized access to voluntary pregnancy termination. This platform both supports and goes beyond the decisions handed down by the Court in 1973 and 1976. The Court ruled that during the first trimester of pregnancy there should be no State interference in the decision by the patient and physician to abort; that during the second trimester the State's sole concern is with the women's physical safety in relation to abortion; that abortion may be performed outside of hospitals; and that the woman is not required to obtain either her husband's or her parents' consent if she wishes to end her pregnancy. The "prochoice" movement has attempted to extend the effects of these rulings by pressing for the removal of all barriers, not merely legal prohibitions, to abortion access. For example, the movement has insisted that poverty, or adventitious lack of access to funds for abortion (such as among teenagers who may be in otherwise comfortable circumstances), not restrict women from freely seeking a termination of unwanted pregnancy. The "prochoice" platform thus not only supports de jure legalization of abortion, but also de facto implementation of this legalized access.

During the past five years, this liberal abortion platform appears to have been undermined. There have been two principal sources of this erosion. First, the Supreme Court itself has not concurred with the "prochoice" emphasis on government funding for abortions. In a five-to-four opinion on Harris v. McRae (June 30, 1980), the Court ruled that the Hyde amendment (the Congressional ban on federal support for all but a few types of abortion) does not violate the due process or equal protection rights of indigent women, but rather that "... the Hyde Amendment bears a rational relationship to [the Government's] legitimate interest in protecting the potential life of the fetus."[1] The Court also ruled that the Hyde Amendment does not violate the First Amendment by establishing religion.

Second, Supreme Court decisions, such as Harris v. McRae, have been simply the tip of an iceberg which consists of massive local, state, and Congressional efforts by the "prolife" movement to restrict access to abortion, or to abolish such access altogether.[2] These efforts, more often than not, have been in contravention of the original Supreme Court decisions in 1973. However, invalidating anti-abortion local ordinances and state laws as unconstitutional has been a lengthy judicial process. Moreover, mustering opposition to the anti-abortion amendments that increasingly are appended to Congressional appropriations bills—the Hyde amendments being the most famous—is a politically enervating endeavor. Finally, a growing number of states are calling for a constitutional convention to support a "human life" amendment to the Constitution.

These political victories for a movement, like "prolife," that seeks to abolish all access to abortion, have been perplexing to "prochoice" supporters and to social scientists as well, because public opinion data indicate widespread support for some liberalization of abortion access.[3] Most certainly, outright disapproval of abortion under any circumstances is rare, as is approval only in the case of danger to the mother's health or life should the pregnancy be continued. In fact, although only about 40 percent or less of respondents typically approve all four justifications for abortion (mother's health, child defect, financial stress, and desire to avoid having the child for any reason), most respondents seem to have some sort of middle position—approval of some justifications but not others. How can a movement that seeks to ban abortions be so successful with elected officials, when most people in the country seem to support some access to abortion? In an effort to provide some answers to this question, we will document, in this paper, the extent of popular support for the content of the Supreme Court's 1973 and 1976 decisions, and for the "prochoice" concern about Government funding for abortions.

Our hypothesis is that, with regard to justifications for abortion, there really is no "middle" position—a position that approves some justifications but not others. People who believe that women should have access to abortion will not try to fine-tune their approval in ways that would make access impossible to implement—proof of irreparable damage to health, proof of major damage to the fetus, proof of financial stress. Hence, we would expect to find that people who equivocate in this manner are closer to those who are totally negative, than to those who approve all justifications. By extension, we would expect that people who do not "scale" in their views on abortion are also closer to being negative than positive. Finally, we expect that, just as outright negativism is rare, so is unconditional support for the entire "prochoice" platform. Let us look at the evidence.

DATA AND METHODS

We have used eight General Social Science Surveys conducted by the National Opinion Research Center (NORC) dating from 1972 to 1980, eight Gallup surveys dating from 1968 to 1977, and two National Fertility Surveys conducted in 1965 and 1970. The sample size in the Gallup surveys is between 1,500 and 1,600 respondents, the NORC samples are approximately 1,500, and the National Fertility Study samples used here were 5,617 in 1965 and 6,752 in 1970. These surveys contained analogous questions on justifications for abortion—the health of the mother, defect or deformity in the child, financial stress for the couple, and the desire to have no more children (unwantedness). The questions are presented in Appendix A. It should be noted that some incomparabilities exist among the questions in the three sets of surveys, although within each set the questions are identical over time.[4] These incomparabilities in questioning produce some differences in the proportions against abortion among the NORC, Gallup, and fertility surveys (Table 1). However, the incomparabilities do not affect the analysis that follows, since we do not make comparisons across the different sample groups.

In conformity with our research question, we divided respondents in all the surveys into those whose answers formed a Guttman-type[5] progression with respect to the justifications: 1) negative on all four items, 2) positive regarding only the mother's health, 3) positive regarding only the mother's health and child defect, 4) positive with regard to the mother's health, child defect, and financial stress, 5) positive regarding all justifications and

Table 1.—Approval or Disapproval of Four Justifications for Legalizing Abortion Among Respondents in Eight NORC, Eight Gallup, and Two National Fertility Studies. United States, 1960s and 1970s

Abortion Attitudes[a]	1965	1968	1968	1969	1970	1972	1973	1974	1975	1976	1977	1978	1980
						NORC							
1	--	--	--	--	--	9	6	6	7	7	7	8	8
2	--	--	--	--	--	7	7	6	6	7	5	7	7
3	--	--	--	--	--	22	26	24	24	26	24	28	24
4	--	--	--	--	--	8	7	9	8	8	9	9	6
5	--	--	--	--	--	34	42	40	39	40	39	34	40
6	--	--	--	--	--	19	12	17	16	12	15	14	15
Total	--	--	--	--	--	100	100	100	100	100	100	100	100
						GALLUP							
1	--	9	8	11	10	9	11	8	--	--	9	--	
2	--	15	13	12	9	9	11	10	--	--	11	--	
3	--	38	38	34	27	29	25	23	--	--	26	--	
4	--	9	10	8	11	10	10	13	--	--	7	--	
5	--	9	11	13	20	23	23	27	--	--	26	--	
6	--	20	20	22	23	20	20	19	--	--	21	--	
Total		100	100	100	100	100	100	100	--	--	100	--	
						FERTILITY STUDIES							
1	10	--	--	--	8	--	--	--	--	--	--	--	
2	35	--	--	--	18	--	--	--	--	--	--	--	
3	34	--	--	--	35	--	--	--	--	--	--	--	
4	4	--	--	--	6	--	--	--	--	--	--	--	
5	5	--	--	--	17	--	--	--	--	--	--	--	
6	11	--	--	--	16	--	--	--	--	--	--	--	
Total	100	--	--	--	100	--	--	--	--	--	--	--	

a--The numbers in the stub represent disapproval of all justifications for abortion (1), approval of the mother's health only (2), approval of the mother's health and child defect only (3), approval of the mother's health, child defect, and financial stress only (4), approval of all justifications (5) and inconsistent (6). The sample size in the Gallup surveys is between 1,500 and 1,600 respondents, the NORC samples are approximately 1,500, and the National Fertility Study samples used here were 5,617 in 1965 and 6,752 in 1970.

6) inconsistent. Respondents who did not "scale" in the first five groups (for example, who approved elective abortion but did not approve abortions in the event of a threat to the mother's health or possible defect in the child) were labelled "inconsistent" and will be discussed subsequently. Table 1 shows, for all the surveys, the proportion of respondents by type of response category.

An examination of this table demonstrates clearly why it is important to know more about those respondents who are neither essentially negative nor totally positive regarding legalized abortion (Groups 3, 4, and 6). These people who are between the extremes or inconsistent constitute over one-half to two-thirds of the public. Even if one confines one's consideration to respondents with a consistent set of opinions, (Groups 1 through 5) it is clear that the "middle" positions are strongly predominant. Moreover, since support for all justifications is limited (and, in recent years, not increasing), it is of interest to know whether this group of supporters remains positive regarding other points (such as Medicaid for abortions), or is further eroded as additional issues are brought before it.

Preliminary to the main body of our analysis, a canonical correlation was done using age, sex, race, religion, education, income, and community size as independent variables and the five abortion groups as the dependent variable. This analysis was performed on all the surveys. In all cases the first canonical variate strongly justified our combining group 1 with group 2 (totally negative and mother's health only), group 3 and group 4 (mother's health and child defect, and mother's health and child defect plus financial stress). Thus, we have called these three groups—the "negatives," the "equivocators," and the "positives." Previous research has shown that there are large compositional differences between respondents who are at negative and positive poles in their abortion attitudes.[6] In other words, these background variables have shown significant discriminatory power regarding the "extremes" of abortion attitudes.

Since the politics of abortion appear to be in the process of polarizing in the United States, and the future of abortion policy will doubtless increasingly involve the electorate rather than the judiciary, it is important to know something of the probable underlying views toward abortion of those who appear to be "in the middle," what we call equivocators. Would people who equivocate (see conditions under which abortion would be acceptable) be more likely to side with a positive or a negative extreme—assuming that this is a choice they might have to make? One way of attempting to answer such a question is to ask whether those "in the middle" on abortion are more similar in characteristics to those who are positive or to those who are negative.

ARE EQUIVOCATORS MORE LIKELY TO VEER TOWARD THE POSITIVE OR THE NEGATIVE POLE?

In an attempt to infer whether equivocators would veer toward the positive or the negative pole regarding abortion, we have used a form of "dummy" multiple regression analysis, Multiple Classification Analysis (Andrews et al., 1973) to discriminate among these three groups.[7] Using the amount of explained variance (R^2) as an index of the discriminatory power of the predictors, we can infer that a large R^2 indicates more dissimilarity than a small R^2. Thus, if contrasting equivocators and positives results in a large R^2, and contrasting equivocators and negatives produces a small one, we may infer that the equivocators are more like the negatives than the positives, and are more likely to side with the negatives. First, we contrasted the groups using background variables as predictors (age, sex, race, religion, education, income, and community size), and later we added selected attitudinal variables.

Are the equivocators similar to negatives or to positives? The answer is clear.

In almost all surveys (Table 2), the equivocators are much closer in background characteristics to the negative than to the positive pole. This is indicated by the fact that the R^2 is much lower when the equivocators are compared with the negatives than with the positives. Typically, the variance explained the background factors is two to three times greater when the equivocators are compared to the positives than to the negatives.

Further confirmation of the greater similarity of equivocators to the negative pole comes from those surveys where a variety of attitudinal items could be used as predictors. These items were available in the 1974, 1975, 1977, and 1978 NORC studies, and the 1970 National Fertility Study. The NORC studies contained a number of attitudinal items that, a priori, we believed might be related to tolerance of abortion legalization. Among these were questions that purported to measure respondents' permissiveness, or lack of it, regarding sexual behavior. These were views about homosexuality, pornography, and premarital sexual relationships. Only the item on premarital relationships was related to abortion attitudes, indicating that views on abortion are not so much associated with sexual strictness generally as with a specific concern about premarital freedom. Most predominant as predictors of abortion attitudes were items that measured respondents' views on individual discretion regarding mortality—euthanasia and suicide, and those measuring degrees of "familism"—attitudes toward liberalization of divorce laws and toward family size. Interestingly, tolerance of abortion was not correlated with other indicators of "prolife" sentiments such as opposition to capital punishment and war. Views about women's rights also do not seem related to these attitudes, although the prochoice movement has configured the abortion issue partly in these terms. Equally, permissiveness toward abortion does not appear to be associated with measures of political alienation or negativism toward the society, although Vinovskis has suggested that "for many prolife people, abortion is only a symptom of the wrongs in our society .... Abortion is a convenient target."[8] In this analysis, we have used, from

Table 2.—Amount of Variance Explained by Selected Background Variables, Comparisons of Respondents Who Are Positive, Negative, and Equivocating Toward Legalization of Abortion. Eight NORC, Eight Gallup, and Two National Fertility Surveys. United States, 1960s and 1970s

	R^2 (Adjusted for degrees of freedom)					
	NORC		GALLUP		FERTILITY STUDIES	
Date	Negatives vs Equivocators	Positives vs Equivocators	Negatives vs Equivocators	Positives vs Equivocators	Negatives vs Equivocators	Positives vs Equivocators
1980	.076	.143				
1978	.038	.106	---	---	---	---
1977	.046	.080	.049	.124	---	---
1976	.040	.094	---	---	---	---
1975	.035	.080	---	---	---	---
1974	.014	.089	.023	.121	---	---
1973	.024	.113	.030	.126	---	---
1972	.126	.122	.064	.116	---	---
[illegible]	---	---	.064	.111	.044	.113
[illegible]	---	---	.071	.101	---	---
[illegible]	---	---	.040	.093	---	---
[illegible]	---	---	.062	.094	---	---
[illegible]	---	---	---	---	.084	.038

the NORC studies, the questions on premarital sex, euthanasia, divorce laws, and family-size preferences. From the 1970 Fertility Study, we have included attitudes toward government aid for abortions, abortion if the husband opposes, and abortion beyond the first trimester.

The attitudinal data were regressed as a second stage, after the effects of the background variables had been taken into account. From Table 3, it is evident that, except when "euthanasia" is included in the regression, the equivocators are markedly more similar to respondents who are negative toward abortion than to those who are positive. The results point up, moreover, that the relative similarity of equivocators to negatives, and their relative distinction from positives, would hold even if there were no differences in background characteristics. Equivocators are closer to negatives than to positives on attitudinal items, over and above background effects. In addition, the combined differences (background and attitudinal) between equivocators and positives (Table 4) are substantially greater than between equivocators and negatives.

These findings shed some light on the apparently limited public support for abortion in the United States. The fact that high proportions of respondents can

Table 3.—Amount of Residual Variance Explained by Selected Attitudinal Variables. Comparisons of Respondents Who Are Positive, Negative, and Equivocating Toward Legalization of Abortion. Four NORC Surveys and the 1970 National Fertility Study. United States, 1970s

	R^2 (Adjusted for degrees of freedom)			
	NORC		1970 Fertility Study	
	Negatives vs Equivocators	Positives vs Equivocators	Negatives vs Equivocators	Positives vs Equivocators
1978[a]				
Divorce Laws, Euthanasia, Ideal Family Size, Premarital Sex	.116	.108	---	---
Divorce Laws, Ideal Family Size, Premarital Sex	.060	.100	---	---
1977				
Divorce Laws, Euthanasia, Ideal Family Size, Premarital Sex	.097	.100	---	---
Divorce Laws, Ideal Family Size, Premarital Sex	.048	.093	---	---
1975				
Divorce Laws, Ideal Family Size, Premarital Sex	.063	.078	---	---
1974				
Divorce Laws, Ideal Family Size, Premarital Sex	.052	.091	---	---
1970				
Abortion: Government Expense; Abortion: Husband Opposes; Abortion: More than 3 Months Pregnant	---	---	.072	.160

a--The attitudinal variables are listed in alphabetical order.

Table 4.—Amount of Variance Explained by Background and Attitudinal Variables. Comparisons of Respondents Who Are Positive, Negative, and Equivocating Toward Legalization of Abortion. Four NORC Surveys, and the 1970 National Fertility Study. United States, 1970s

	R^2 (Adjusted for degrees of freedom)			
	NORC		1970 Fertility Study	
	Negatives vs Equivocators	Positives vs Equivocators	Negatives vs Equivocators	Positives vs Equivocators
1978[a]				
Background Factors Plus: Divorce Laws, Euthanasia, Ideal Family Size, Premarital Sex	.147	.200	---	---
Divorce Laws, Ideal Family Size, Premarital Sex	.093	.191	---	---
1977				
Background Factors Plus: Divorce Laws, Euthanasia Ideal Family Size, Premarital Sex	.139	.173	---	---
Divorce Laws, Ideal Family Size, Premarital Sex	.091	.151	---	---
1975				
Background Factors Plus: Divorce Laws, Ideal Family Size, Premarital Sex	.100	.151	---	---
1974				
Background Factors Plus: Divorce Laws, Ideal Family Size, Premarital Sex	.065	.169	---	---
1970				
Background Factors Plus: Abortion: Government Expense; Abortion: Husband Opposes; Abortion: More than 3 Months Pregnant	---	---	.114	.255

a--The attitudinal variables are listed in alphabetical order.

be found to approve at least one reason for legalizing abortion does not, apparently, constitute very meaningful public support. People who equivocate, who wish to fine-tune the justifications for abortion, apparently are more negative than positive in their views about legalizing abortion. In fact, it may be fair to say that these respondents are "closet negatives."

HOW SUPPORTIVE ARE THE SUPPORTERS?

Having seen that equivocators are similar in characteristics to those respondents at the negative pole, we may ask whether respondents at the positive end of the spectrum regarding legalization of abortion can be relied upon to back a variety of other issues in the prochoice platform? For example, are they positive toward government payments for abortion, abortion beyond the first three months of pregnancy, abortion without the husband's consent, or abortion without parental consent? Our analysis indicates that such broad-gauged support should not be taken for granted, even among the strongest proponents of legalized pregnancy termination.

Our data are from the 1970 National Fertility Survey, and from a 1977 Gallup survey on which we commissioned questions. Both of these surveys queried respondents about their views on the legalization of abortion and, as well, their attitudes toward other features of abortion policy. The 1970 survey asked about abortion at government expense, abortion if the woman's husband is opposed, and abortion if the woman is more than three months pregnant. The 1977 survey also asked about abortion at government expense and in the event the husband is opposed. Additionally, it queried about abortion without the parents' consent if the woman is a minor.

In our analyses, we first adjusted, for the effects of the background variables we have used to date, the proportions who approved legalization of abortion under all circumstances. Then, we considered what proportion of these respondents would remain positive when asked about the additional issues. For example, what proportion would be positive toward all three issues? What proportion positive toward one, toward two, or toward none? Table 5 shows the results for the 1970 and the 1977 surveys. In the 1970 survey, we see that, even among respondents who approve all reasons for legalizing abortion, 26 percent disapprove all three of the additional issues—Medicaid, abortion without the husband's consent and abortion beyond the first three months of pregnancy. Twenty-nine percent approve one of the added conditions, 27 percent approve two, and only 18 percent approve all three. The results are very similar for the 1977 survey. Among respondents who approve legal abortion, when asked about abortion at government expense, abortion if the husband opposes, or abortion without the parents' consent, 20 percent disapproved all three conditions, 27 percent approved one, 28 percent approved two, and only 25 percent approved all three.

What about the popularity of the individual issues? Again, using the same group of altogether positive respondents concerning the legalization of abortion, we can see from Table 6 how the issues fare individually. Obviously, in both 1970 and 1977 the least unpopular condition is abortion at government expense. However, the 1977 data allow us to disaggregate unenthusiastic from enthusiastic approval. We see that although 65 percent of the respondents give some approval, only 35 percent approved enthusiastically. Highly unpopular, even within this group of respondents who are positive toward legalized abortion, are abortion if the husband opposes, abortion without parental consent, and abortion if the woman is more than three months pregnant.

Quite clearly, although the prochoice movement consolidates all of these issues into one platform of abortion reform, the general public does not share this model. Even "positives" regarding legalized abortion do not carry this sentiment to the point of encroaching on what they appear to regard as family rights and obligations. Nor do these respondents feel that legalized abortion should necessarily be funded by the government, or that abortions should be performed during mid or late pregnancy. The prochoice movement, true to its form as a movement, pursues all encumbrances to abortion—direct and collateral—and attempts to eradicate them. The public is not only a weak ally in this battle, but, when support is forthcoming, it is for statutory legalization, not de facto implementation. Abortion thus takes its place at the end of a long line of issues on which "policy" has run far ahead of the nation's will to execute.

THE INCONSISTENTS

We have seen (Table 1) that approximately 15–20 percent of respondents do not scale in the Guttman type progression of attitudes toward the legalization of abortion. Considering these respondents as a group, are their characteristics more like those of respondents who are totally positive, or totally negative?

Again, the results are striking (Table 7). The inconsistents in each survey are markedly more similar to the negatives

Table 5.—Percentage Approving Additional Conditions for Abortion Among Respondents Who Approve All Legal Justifications. United States, National Fertility Study 1970 and Gallup Survey 1977[a]

Among Respondents Who Are Positive Toward Legalizing Abortion, The Percentage Who Approve:	1970	1977
None of the additional conditions	26	20
One condition	29	27
Two conditions	27	28
Three conditions	18	25
Total	100 (1036)	100 (553)

a--In the 1970 National Fertility Study, the additional conditions were: abortion at government expense, abortion if the woman's husband is opposed, and abortion if the woman is more than three months pregnant. In the 1977 Gallup survey, the conditions were the same except that "parental consent" replaced "more than three months pregnant."

Table 6.—Percentage Approving Additional Conditions for Abortion Among Respondents Who Approve All Legal Justifications. United States, National Fertility Study 1970 and Gallup Survey 1977

Among Respondents Who Are Positive Toward Legalizing Abortion, The Percentage Who Approve:	1970	1977
Abortion at Government Expense	65	65[a]
Abortion if Husband Opposes	39	48
Abortion Without Parents' Consent	--	46
Abortion if More Than Three Months Pregnant	33	--
	(1036)	(553)

a--The 1977 survey distinguished between respondents who approved of abortion at government expense enthusiastically ("a good idea") and reluctantly ("I am not enthusiastic about it"). Thirty-five percent were enthusiastic and 30 percent were unenthusiastic.

than to the positives in background characteristics. Moreover, the differentiation of the inconsistents from the positives is, generally speaking, sharper than was the case with the equivocators. That is, the inconsistents are less similar to the positives than are the equivocators.

Further confirmation of the closer similarity of inconsistents to the negatives comes from Table 8, where, as with the equivocators, attitudinal data were regressed as a second stage, after the effects of the background variables had been taken into account. We see that, in most cases, inconsistents are closer to negatives than to positives.

CONCLUSION

In this paper, we attempt to understand the difference between public views on one or another justification for abortion, and public endorsement of the goals of the prochoice movement. Our results, using numerous national surveys taken during the 1960s and 1970s, demonstrate that although out-and-out negativism toward legalized abortion is rare, so is support for basic planks in the prochoice platform. Even respondents who endorse all four justifications for abortion (health, child defect, financial stress, and elective abortion) undergo enormous attrition in numbers approving when they are asked about Medicaid for abortion, abortion without the husband's or parents' consent, or abortion past the first trimester.

Nor are those we have called "equivocators" regarding justifications for abortion (persons who approve some justifications but do not approve elective abortion) to be counted on by the prochoice movement as either a middle group, or one that is basically positive. Rather, our analysis demonstrates that these respondents are consistently more like, in background characteristics and attitudes, those at the negative pole than those at the positive one. The same is true, in even greater measure, of respondents who are inconsistent regarding justifications for abortion.

We believe that these results explain the perception by politicians that the prochoice platform is not popular. As a totality, it clearly is not widely endorsed—not even by those who support legalization of elective abortion. Among the rest of the people, equivocation and inconsistency place respondents close to the negative pole—certainly much closer than to the

Table 7.—Amount of Variance Explained by Selected Background Variables, Comparisons of Respondents Who Are Positive, Negative, and Inconsistent Toward Legalization of Abortion. Eight NORC, Eight Gallup, and Two National Fertility Surveys. United States, 1960s and 1970s

	R^2 (Adjusted for degrees of freedom)					
	NORC		GALLUP		FERTILITY STUDIES	
Date	Negatives vs Inconsistents	Positives vs Inconsistents	Negatives vs Inconsistents	Positives vs Inconsistents	Negatives vs Inconsistents	Positives vs Inconsistents
1980	.044	.145	---	---	---	---
1978	.031	.124	---	---	---	---
1977	.026	.077	.056	.120	---	---
1976	.069	.128	---	---	---	---
1975	.004	.059	---	---	---	---
1974	.023	.075	.045	.146	---	---
1973	.007	.146	.025	.200	---	---
1972	.030	.149	.043	.168	---	---
1970	---	---	.040	.148	.036	.091
1969	---	---	.039	.179	---	---
1968	---	---	.065	.135	---	---
1968	---	---	.060	.148	---	---
1965	---	---	---	---	.029	.069

Table 8.—Amount of Residual Variance Explained by Selected Attitudinal Variables. Comparisons of Respondents Who Are Positive, Negative, and Inconsistent Toward Legalization of Abortion. Four NORC Surveys and the 1970 National Fertility Study. United States, 1970s

	R^2 (Adjusted for degrees of freedom)			
	NORC		1970 Fertility Study	
	Negatives vs Inconsistents	Positives vs Inconsistents	Negatives vs Inconsistents	Positives vs Inconsistents
1978[a]				
Divorce Laws, Euthanasia, Ideal Family Size, Premarital Sex	.102	.092	---	---
Divorce Laws, Ideal Family Size, Premarital Sex	.058	.087	---	---
1977				
Divorce Laws, Euthanasia, Ideal Family Size, Premarital Sex	.124	.141	---	---
Divorce Laws, Ideal Family Size, Premarital Sex	.080	.115	---	---
1975				
Divorce Laws, Ideal Family Size, Premarital Sex	.053	.078	---	---
1974				
Divorce Laws, Ideal Family Size, Premarital Sex	.023	.100	---	---
1970				
Abortion: Government Expense; Abortion: Husband Opposes; Abortion More than 3 Months Pregnant	---	---	.150	.138

a--The attitudinal variables are listed in alphabetical order.

positive one, and obviously not equidistant between the extremes. Apparent middle positions just seem to indicate a preference for de jure liberalization, and de facto limitation, of access.

ACKNOWLEDGMENTS

This research was supported by Contract HD-82832 from the National Institute of Child Health and Human Development.

NOTES

[1] 48 U.S.L.W. 4941.

[2] For a concise and well-organized review of the multiple types of collateral deterrence regarding abortion access, see the journal *Family Planning/Population Reporter: A Review of State Laws and Policies* over the past five years.

[3] See Judith Blake, "Abortion and Public Opinion: The 1960–1970 Decade," *Science*, Vol. 171 (12 February 1971), pp 540–549; also, by the same author, "Elective Abortion and Our Reluctant Citizenry," In Howard J. and Joy Osofsky, ed. *The Abortion Experience*, (Hagerstown, Maryland: Harper and Row, 1973), pp. 447–467, and "The Supreme Court's Decisions and Public Opinion in the United States," *Population and Development Review*, Vol. 3 (March and June, 1977), pp. 45–62. Also, Elise F. Jones and Charles F. Westoff, "Changes in Attitudes Toward Abortion: With Emphasis upon the National Fertility Study Data," in *The Abortion Experience*, op. cit., pp. 468–471; and, William Ray Arney and William H. Trescher, "Trends in Attitudes Toward Abortion, 1972–1975," *Family Planning Perspectives*, Vol. 8 (May/June, 1976), pp. 117–124.

[4] The Gallup questions were asked in the order of the Guttman scale—health, child defect, financial stress, and unwantedness. This progression produces

APPENDIX A

The questions from the three sets of surveys were as follows:

GALLUP

Do you think abortion operations should or should not be legal:

a. In cases where the health of the mother is in danger?
b. In cases where the child may be born deformed?
c. In cases where the family does not have enough money to support another child?
d. In cases where the parents simply have all the children they want, although there are no major health or financial problems involved in having another child?

NORC

Please tell me whether you think it should be possible for a pregnant woman to obtain a legal abortion:

a. If there is a strong chance of serious defect in the baby?
b. If she is married and does not want any more children?
c. If the woman's health is seriously endangered by the pregnancy?
d. If the family has a very low income and cannot afford any more children?

1965 and 1970 Fertility Studies

I'm going to read you a list of possible reasons why a woman might have a pregnancy interrupted. Would you tell me whether you think it would be all right for a woman to do this:

a. If the pregnancy seriously endangered the woman's health?
b. If the couple could not afford another child?
c. If they didn't want any more children?
d. If the woman had good reason to believe the child might be deformed?

---

some negative order-effect on the last question. This question, moreover, posed the issue of elective abortion pointedly, calling attention to the difference between not wanting the child despite a lack of physical or financial stress, and having stress-related reasons for desiring to terminate the pregnancy. Hence, both the order of items and the wording may have engendered a negative bias toward the question on elective abortion (unwantedness). In the NORC series, this item appeared second in a list of questions on abortion beginning with the justification in terms of child deformity. The NORC question on elective abortion, both because of the order in which it was asked and because it did not point up any difference between stress and nonstress reasons, avoided a possible negative bias. However, it may have produced a positive one. A number of respondents may have answered affirmatively to the item on the grounds of implicit stress reasons for not wanting a child. Respondents had no way of knowing that the additional questions on health and finances were going to be asked and may have injected them into the implicit logic of their responses—if a woman does not want any more children it may be because she is ill or in financial straits. Finally, the National Fertility Studies asked whether abortion would be "all right" under various conditions, rather than whether it should be legal. This may have introduced a negative bias, since many people think that things should be legal that are not, in their view, "all right." See Judith Blake, "Elective Abortion and Our Reluctant Citizenry," op. cit.

[5] See Earl R. Babbie, *Survey Research Methods*, (Belmont, California: Wadsworth Publishing Co., 1973), pp. 272–6.

[6] See Judith Blake and Jorge H. del Pinal, "Predicting Polar Attitudes Toward Abortion in the United States," in James T. Burtchael (ed.), *Abortion Parley* (New York: Andrews and McMeel, Inc., 1980), pp. 27–56.

[7] See Frank M. Andrews, James N. Morgan, John A. Sonquist and Laura Klem, *Multiple Classification Analysis*, Second edition, (Ann Arbor, Michigan: The University of Michigan, 1973). An alternative method would be the use of discriminant analysis to contrast "positives" and "negatives" and to derive a classification function to allocate "equivocators" into positives or negatives; see Norman H. Nie, C. Hadlai Hull, Jean G. Jenkins, Karin Steinbrenner, and Dale H. Bent, *Statistical Package For The Social Sciences*, Second Edition, (New York: McGraw-Hill Book Co., 1975), pp. 445. However, this type of analysis is more difficult to use and interpret than MCA. In any case, discriminant analysis with two groups is equivalent to multiple regression with a dichotomous dependent variable; see John P. Van de Geer, *Introduction To Multivariate Analysis For The Social Sciences*, (San Francisco: W.H. Freeman & Co., 1971), p. 266.

[8] "Abortion Politics, 1978," Interview with Maris Vinovskis. *ZPG National Reporter*, August 1978.

Public Policy
ISSUES in BRIEF

Volume 1, Number 9, October 1981

Abortion and Public Health: The Facts

In 1978, 3.1 million American women found themselves facing pregnancies they had not intended. Of these women, 1.3 million chose to carry their pregnancies to term and give birth, 400,000 had miscarriages and 1.4 million, or about half, chose to exercise their constitutionally protected option to terminate their pregnancies through safe and legal abortions.[1] For more than seven in 10 of these women, these were their first abortions. More than 90 percent of the abortions were performed during the first trimester of pregnancy, very soon after the women realized they were pregnant.

Women Who Obtain Abortions

About three percent of all American women aged 15 to 44, and 25 percent of those who became pregnant, had abortions in 1978. Although most women who chose to terminate their unintended pregnancies were young, white and childless, more than 200,000 were over age 30 and nearly 350,000 had had at least two children. Nearly four out of every 10 abortions were to the women for whom the health and social consequences of unintended childbearing are the greatest—women over 35 and teenagers.

The parents of over half the teenagers obtaining abortions knew of their daughters' abortions. In the majority of cases in which the parents knew, their daughters told them voluntarily; in many instances, an abortion was obtained at the parents' suggestion.

The number of teenagers terminating unintended pregnancies by abortion has been increasing since 1973 at a rate similar to that for women of all ages. But the increase in abortions to teenagers has been in part responsible for a noticeable decline in the teenage birth rate. In 1973, nearly 60 of every 1000 women aged 15 to 19 gave birth; by 1978, that number had fallen to 52.

Each year since 1973, women have been obtaining abortions earlier in pregnancy when the health risks to the woman and the costs of the procedure are at their lowest. In 1973, less than 40 percent of all women obtaining abortions did so before nine weeks of pregnancy. By 1978, over half of all abortions were performed before nine weeks; and more than nine in 10 abortions were performed during the first 12 weeks, or during the first trimester.

At the far end of the spectrum, less than one percent of all abortions in 1978 were performed after 20 weeks and fewer than four percent were performed between 16 and 20 weeks. As a result, only a small proportion of abortions were performed by saline injection. Although already small, the number of abortions between 16 and 20 weeks may be reduced even further when abortion services become better distributed geographically.

However, there are several serious medical conditions that pose significant risks to the life and health of the pregnant woman that either do not arise or cannot be diagnosed until after the first 15 weeks of pregnancy. For example, many women who have normal blood pressure before pregnancy develop hypertension of pregnancy, or preeclampsia, after the 20th week of gestation. For many who do not respond to other treatment, a late abortion may be a necessity. Renal or kidney failure may also be experienced late in pregnancy. In some cases, if an abortion is not performed, the woman will suffer permanent kidney damage. In addition, amniocentesis to determine if a woman is carrying a fetus afflicted with a severe genetic disorder cannot be performed until

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Table 1. Number and percentage distribution of legal abortions, by selected characteristics, 1973, 1977 and 1978.

Characteristic	No.			% distribution		
	1973	1977	1978	1973	1977	1978
Total	744,610	1,316,700	1,409,600	100.0	100.0	100.0
(1) Age						
<15	11,630	15,650	15,110	1.6	1.2	1.1
15-19	232,440	396,630	418,790	31.2	30.1	29.7
20-24	240,610	449,660	489,410	32.3	34.2	34.7
25-29	129,600	246,680	265,900	17.4	18.7	18.9
30-34	72,550	124,380	134,280	9.7	9.4	9.5
35-39	40,980	61,700	65,350	5.5	4.7	4.6
≥40	16,820	22,000	20,670	2.3	1.7	1.5
(2) Race						
White	548,790	888,780	969,410	73.7	67.5	68.8
Nonwhite	195,820	427,920	440,190	26.3	32.5	31.2
(3) Marital status						
Married	216,210	299,710	350,550	29.0	22.8	24.9
Unmarried*	528,400	1,016,990	1,059,050	71.0	77.2	75.1
(4) No. of living children						
0	375,240	661,280	798,070	50.4	50.2	56.6
1	137,400	268,350	271,270	18.5	20.4	19.2
2	102,160	193,990	198,050	13.7	14.7	14.1
3	61,650	99,710	83,290	8.3	7.6	5.9
≥4	68,160	93,370	58,920	9.1	7.1	4.2
(5) Prior induced abortions						
0	u	966,720	994,520	u	73.4	70.5
1	u	267,830	315,480	u	20.3	22.5
2	u	55,250	71,660	u	4.2	5.1
≥3	u	26,900	27,740	u	2.1	2.0
(6) Weeks of gestation†						
≤8	284,280	657,850	707,750	38.2	50.0	50.2
9-10	221,550	361,170	388,370	29.7	27.4	27.6
11-12	130,630	179,500	187,730	17.5	13.6	13.3
13-15	44,360	52,110	63,130	6.0	4.0	4.5
16-20	53,340	54,110	50,720	7.2	4.1	3.6
≥21	10,450	11,960	11,900	1.4	0.9	0.8
(7) Method						
Instrumental evacuation‡	667,720	1,236,360	1,338,930	89.7	93.9	95.0
Saline instillation	66,610	53,990	50,540	8.9	4.1	3.6
Hysterotomy/hysterectomy	4,120	2,630	1,260	0.6	0.2	0.1
Other§	6,160	23,700	18,870	0.8	1.8	1.3

*Never married, separated, divorced or widowed. †Weeks since last menstrual period.
‡Suction and sharp curettage; includes dilatation and evacuation at 13 weeks' gestation and later.
§Includes prostaglandin, urea, etc. Note: u = unavailable.

Source: S. Henshaw, J.D. Forrest, E. Sullivan and C. Tietze, "Abortion in the United States, 1978-1979," *Family Planning Perspectives*, Vol. 13, No. 1 (Jan./Feb. 1981), p. 17.

the middle of the second trimester of pregnancy.

In 1978, 30 percent of the women obtaining abortions were having a second or subsequent procedure. An increase in both the number and percent of women having repeat abortions is almost totally due to the fact that as the number of women who have ever had a first abortion increases each year, so does the pool of women who are at risk of having another abortion.

The increasing number of repeat abortions does not indicate widespread carelessness about contraceptive use. Neither contraceptives nor the human beings who use them are perfect. For example, four of every hundred women who start to use the IUD to prevent pregnancy become pregnant in a single year. As Table 2 shows, for women using other methods of contraception, the rates of unintended pregnancies are higher.

After 10 years of experience with legal abortion, 52-61 percent of all abortions will be repeat procedures even among a population using contraceptive methods with a high level of effectiveness. Even if all women used the pill fairly consistently, 31-40 percent of abortions could be expected to be repeat procedures after a decade.[2] When these figures are used for comparison, the nation's repeat abortion rate suggests a high level of effective contraceptive use.

Thus, there is no evidence that the increased availability of legal abortion has led to any decrease in contraceptive use. National surveys of ever-married women show steady increases in the number using contraception (and using the most effective methods) both before and after abortion legalization. Indeed, contraceptive use among these women is now virtually universal. Among sexually active unmarried U.S. teenagers, too, the use of contraception increased sharply throughout the 1970s.

The Risks of Abortion

Like all surgical procedures, abortions carry a risk of medical complications, or morbidity. The risk of abortion-related complications is influenced by the abortion method, the woman's age and the number of children she has borne. The main risk from abortion, however, results from delay. In the first trimester of pregnancy, when 90 percent of all abortions in 1978 were performed, less than half of one percent of all abortion patients experienced complications of any kind. Between the eighth and 12th weeks, the risk of major complications doubles from two per 1000 to four per 1000.[3]

Although the number of abortions performed annually has increased steadily, the number of deaths attributable to legal abortions has declined. Eleven deaths from legally induced abortions were reported to the federal Center for Disease Control (CDC) in 1978 (as compared to 26 in 1973), a rate of 0.6 deaths per 100,000 abortions.[4] To put abortion mortality into perspective, according to the most recent published data, the risk associated with other common surgical procedures was nine deaths per 100,000 tonsillectomies and 225 deaths per 100,000 appendectomies in 1974 and 1975.[5] The risk of dying from induced abortion during the first 15 weeks of pregnancy is one-seventh the risk of dying from pregnancy and childbirth.[6]

However, deaths from abortion do increase with the length of gestation. In the first eight weeks of pregnancy, when half of all legal abortions are performed, the mortality rate is only 0.5 deaths per 100,000 abortions. Between the ninth and the 13th weeks of pregnancy, when an additional 41 percent of abortions are performed, the rate rises to 1.9 deaths per 100,000 procedures.[7]

Much concern has been expressed about the effect of abortions on a woman's future childbearing capability. According to a five-year study conducted at the Boston Hospital for Women, a single induced abortion did not result in a decreased ability to carry subsequent pregnancies to term. The study did find, however, that women who had had two or more abortions had an increased risk of miscarriage in subsequent pregnancies. However, characteristics of the women obtaining repeat abortions (such as time between pregnancies and smoking), as well as the type of abortion procedures used in previous abortions, are probably more important factors than the number of abortion procedures, as shown by other conflicting American studies.

Table 2. Percent of women who experience unintended pregnancies within one year of contraceptive use.

Contraceptive Method	Percent
Oral contraceptives	2.3
Intrauterine devices	3.8
Condoms	8.5
Foams, creams, jellies	15.7
Diaphragms	16.1
Rhythm method	21.2

The Effects of Legal Abortion

A large majority of the legal abortions obtained in the United States after the 1973 Supreme Court decisions on abortion replaced procedures that had been performed illegally prior to 1973. American women and their families paid a steep price for those illegal procedures, many of which were carried out by nonmedical personnel or the woman herself in unsanitary surroundings with no facilities for dealing with emergencies. In the 1960s, complications from abortions accounted for almost 20 percent of all pregnancy-related admissions to municipal hospitals in New York and California.[8] In 1965, 235 deaths, or 20 percent of all deaths related to pregnancy and childbirth, were attributed to abortion.[9]

This toll dropped steadily during the 1960s as a result of advances in contraception and medical care and the increased availability of legal abortion after 1967 when states began to relax their stringent antiabortion laws. By 1972, when 587,000 legal abortions were reported nationally, only 39 women died from illegal or self-induced procedures. In 1973, the year of the Supreme Court decisions, illegal abortion deaths fell to 19; in 1977 to four.[10] In 1978, the number of deaths from illegal abortions rose slightly to seven, partially because restrictions on the use of public funds for abortions for indigent women on welfare forced some women who would have obtained publicly funded abortions to resort to self-administered or illegal procedures instead.

The widespread availability of legal abortion has had a profound impact on the lives and health of millions of American women and their families. Thousands of American couples at high risk of bearing children afflicted with severe and often fatal genetic disorders have been willing to conceive and have families only because of the availability of safe and accurate prenatal diagnosis and legal abortion. Almost all amniocentesis procedures are reassuring to parents; only about three percent result in abortion.

Thousands of teenagers have been able to prevent the frequently adverse health, social and economic consequences of teenage births because of legal abortion.

Babies born to teenage mothers are more likely to die in the first year of life than those born to mothers over age 20. The risks of medical complications and of having a low-birth-weight infant, are also considerably greater among teenage mothers.

The most far-reaching consequence of teenage childbearing is the truncation of education among the young parents, and the resulting limitation of opportunities to gain skills necessary to compete effectively in a modern, highly technical society. Largely because of educational deficits, teenage parents are frequently unable to get decent jobs, and their family incomes tend to be much lower than those earned by other families. Whether or not the young parents marry, most of the youngsters born to teenage mothers tend to end up in single female-headed households. And when they grow up, they are more likely than others to become teenage parents themselves.

Many of the women who, since 1973, have chosen to terminate the their unintended pregnancies by legal abortion were women who would have been at high risk of health damage to themselves or of bearing unhealthy children. The widespread use of legal abortion was therefore accompanied by a dramatic reduction in neonatal, or newborn, mortality. Legal abortion is associated with a reduction of 1.5 neonatal deaths per 1000 live births among whites and 2.5

among blacks.[12] Legalization of abortion, according to data collected by the New York City Department of Health, was also accompanied by a 50 percent decline in the maternal mortality rate.[13] In addition, the availability of legal abortion has been associated with a dramatic reduction in the number of children and teenage mothers being placed in foster homes and institutions.[14]

It is impossible to measure what society or individuals must pay in terms of the lost potential of young women who suffer educational, economic, social and health deprivation because they must carry unwanted pregnancies to term at a time when they are unprepared physically, socially or financially to take care of the child. What *can* be measured are some of the medical and social welfare costs that must be borne by government to pay for those unwanted births that women would otherwise have averted through abortion.

A minimum of about 300,000 of the women who received legal abortions in 1978 were women eligible to receive subsidized medical care and other public benefits. If legal abortions were unavailable and if only one-third of these women carried their unintended pregnancies to term rather than obtaining illegal abortions, the cost to the government and the American people would be $386 million in the first year alone. If abortion opponents were successful in preventing all women from obtaining any abortions at all, the public cost would be $1.3 billion. And, these are only the costs to the public in the first year alone. Economists have calculated that the public sector cost of raising a child on welfare is $75,000.[15] If one-third of the women eligible for public assistance carried their unintended pregnancies to term, the American public would incur a future obligation of $6.8 billion each year.

Conclusion

In the years before the 1973 Supreme Court decisions, thousands of American women were willing to risk the sometimes staggering health and economic costs of obtaining illegal abortions. Since 1973, many more women have been able to terminate their unintended pregnancies safely and legally. For some of these women, the costs have remained high. A large number of women needing abortions, unable to obtain them locally, have been willing to travel often great distances. Poor women on welfare, unable to obtain publicly funded abortions, have been willing to undergo severe hardship for themselves and their families to finance needed abortions. Of those women surveyed who said that they themselves had had an abortion, 80 percent felt they were better off today than they would have been if they had chosen to carry their pregnancies to term.[16] As all the numbers and sacrifices endured by women obtaining abortions show, safe and legal abortions are wanted and needed in the United States.

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[1] S. Henshaw, J.D. Forrest, E. Sullivan and C. Tietze, "Abortion in the United States, 1978-79," *Family Planning Perspectives*, Vol. 13, No. 1 (Jan./Feb. 1981), p. 6.

[2] The Alan Guttmacher Institute, *Safe and Legal: 10 Years' Experience with Legal Abortion in New York State*, New York, 1980, p. 35.

[3] W. Cates, K. Schulz, D. Grimes and C. Tyler, "The Effect of Delay and Method Choice On the Risk of Abortion Morbidity," *Family Planning Perspectives, Vol. 9, No. 6* (Nov./Dec. 1977), p. 267.

[4] Center for Disease Control, *Abortion Surveillance 1978*, pp. 47, 61.

[5] National Center for Health Statistics, DHHS, Final Mortality Statistics, 1975 and Commission on Professional and Hospital Activities, 1974-75 PAS Hospital Mortality Data.

[6] W. Cates, "Legal Abortion and Women's Health: Gains and Losses in the 1970s," unpublished.

[7] CDC, *Abortion Surveillance 1978*, p. 48.

[8] E.C. Moore-Cavar, *International Inventory of Information on Induced Abortion*, New York, 1974, pp. 520, 593-5, 603-6, 642.

[9] *Ibid.*

[10] CDC, *Abortion Surveillance 1978*, p. 61.

[11] F. Jaffe, B. Lindheim, and P. Lee, *Abortion Politics: Private Morality and Public Policy*, New York, 1981, p. 157.

[12] "Legal Abortion, Family Planning Services Largest Factors in Reducing U.S. Neonatal Mortality Rates," *Family Planning Perspectives*, Vol. 13, No. 2 (March/April 1981), p. 84.

[13] J. Pakter and F. Nelson, "Abortion in New York City: The First Nine Months," *Family Planning Perspectives*, Vol. 3, No. 3 (July 1971), p. 5.

[14] *Safe and Legal*, p. 30.

[15] *Ibid.*, p. 32.

[16] *Washington Post*/ABC News poll, June 8, 1981.

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May 1981

PUBLIC OPINION AND ABORTION

BRIEF SUMMARY STATEMENT

The majority of Americans oppose abortion on demand and want abortions illegal in some or all circumstances.

Public opinion surveys are often poorly conducted and should be evaluated before the findings are accepted as valid.

Even if a majority of Americans supported legalized abortion on demand or were clearly divided on the question, the laws of the country should protect the unborn because an inalienable right is involved.

BACKGROUND INFORMATION

I. The Majority of Americans Oppose Abortion on Demand (Elective) and Want Abortions Legal Only Under Certain Circumstances

A) In early 1981 the Connecticut Mutual Life Insurance Co. released the results of an indepth national survey they commissioned entitled "American Values in the '80's: The Impact of Belief. The intent of the survey was to investigate the extent to which traditional American values have remained prevalent in contemporary society. The study additionally sought to identify the belief and attitudes of leaders, and to compare them to those of the public. 65% of the American public consider abortion morally wrong, while 36% of the leaders do. Breaking down the leaders, we find 29% of those in government feel abortion is morally wrong, with 71% believing it is not a moral issue. (Survey conducted by Research and Forecasts, Inc., pp. 86, 92, 201 and 219).

B) Attitudes of U.S. Men and Women Toward Elective Abortion (Percent Distribution)[1]

Source and Attitude	1965	May 1968	Dec. 1968	1969	1970	1972	1973	1974	1975	1977	1978	1980
Gallup surveys												
Approving		11	13	14	23	27	27	31		30		
Disapproving		85	81	79	69	67	68	63		63		
No opinion		4	6	7	8	6	5	6		7		
Total		100	100	100	100	100	100	100		100		
Respondents		(1611)	(1517)	(1560)	(1525)	(1513)	(1550)	(1583)		(1549)		
NORC surveys												
Approving						40	46	45	46		40	40
Disapproving						60	51	50	54		60	60
No opinion						0	3	5	0		0	0
Total						100	100	100	100		100	100
Respondents						(1613)	(1504)	(1464)	(1490)			
National Fertility Studies												
Approving	8				21							
Disapproving	91				76							
No opinion	1				3							
Total	100				100							
Respondents	(4810)				(5981)							

SOURCES: Nationwide Gallup and National Opinion Research Center surveys of voting age adults and 1965 and 1970 National Fertility Studies of married women in the reproductive ages.

NOTE: The questions asked on the three major data sets differed somewhat. The NORC attitudes deal most commonly with question "Should it be possible for a pregnant woman to obtain a legal abortion if she is married and does not want any more children?"

C) Responses to a Question Whether There Should Be No Legal Restraint on Abortion or Whether the Law Should Specify Circumstances that Justify Abortion (Percent Distribution)[1,2]

	Sept. 1972	Sept. 1974	April 1975	Dec. 1977	Feb. 1979	July 1980
No legal restraint (legal under all circumstances)	39	40	21	22	22	25
Law should specify circumstances (legal only under certain circumstances)	54	53	54	53	54	53
Illegal under all circumstances	..	..	22	19	19	18
No opinion	7	7	3	4	5	4
Total	100	100	100	100	100	100
Total respondents	(1,546)	(1,583)	(1,535)	(1,513)	(1,534)	(1,548)

Sources: Gallup surveys of voting age adults, September 1972, September 1974, April 1975, December 1977, February 1979, and July 1980.

D) In May, 1979, the Roper Organization asked 1,502 Americans that if a constitutional convention were held today, would you favor a constitutional amendment to outlaw abortions not needed to save a mothers life. The amendment was opposed 48-46.

E) Response to "A Constitutional amendment has been proposed which would prohibit abortions except when the pregnant woman's life is endangered. Would you favor this amendment which would prohibit abortions or would you oppose it?"

	Favor Amendment	Oppose Amendment	No Opinion
NATIONAL..............	45%	49%	6%
Republicans...........	48	47	5
Democrats.............	48	44	8
Independents..........	39	56	5
Protestants...........	46	48	6
Roman Catholics.......	52	42	6
Men...................	42	50	8
Women.................	48	47	5
College background....	30	65	5
High school...........	49	46	5
Grade school..........	56	31	13
Under 30 years........	38	57	5
30-49 years...........	43	50	7
50 & over.............	52	41	7
Married...............	47	47	6
Single................	30	63	7

SOURCE: Gallup survey based on personal interviews with 1,525 adults, 18 and older, in more than 300 scientifically selected localities during February 27-March 1, 1976.

F) Response to the "The United States Supreme Court recently ruled that all of the states' abortion laws are unconstitutional. For practical purposes, this ruling has made abortion available to a woman on request throughout her pregnancy. The United States Congress is considering four possible courses of action in this matter. If you were the Congressman from this area, which of these alternatives would you vote for?

November-December 1974

		Region							Religion			Race			
Policy Alternative	Total	NE.	MA.	ENC.	WNC.	S.	W.	P.	C.	P.	J.	W.	B.	S.	Female
1. Congress should overrule the Supreme Court and make all abortions illegal	7.1	8.9	7.6	7.5	5.8	8.8	5.2	4.5	10.3	5.3	0.9	6.7	10.1	9.4	8.1
2. Congress should overrule the Supreme Court and provide that abortion is illegal except when necessary to save the life of the mother	25.7	16.5	18.8	29.2	35.7	28.2	30.2	21.1	24.7	28.8	6.1	25.2	29.6	26.4	26.0
3. Congress should do nothing and let the Supreme Court decision stand	25.1	40.1	31.7	19.0	17.8	22.3	19.9	31.5	21.1	21.8	63.1	25.5	21.8	23.1	22.4
4. Congress should overrule the Supreme Court by restoring to each State the right to permit or prohibit abortion	22.9	19.9	22.7	21.8	22.1	23.4	22.3	26.3	20.1	24.7	22.9	23.9	17.8	17.7	23.1
5. Congress should overrule the Supreme Court and provide that abortion is illegal except in specific cases as determined by law	16.6	12.1	16.2	20.4	16.9	14.7	19.9	14.5	20.6	16.5	4.0	16.3	17.8	22.0	17.4
Not Sure	2.6	2.5	3.0	2.1	1.7	2.6	2.5	2.0	2.6	2.3	3.0	2.3	2.8	1.4	2.4

Key: Regions: Northeast (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut); Middle Atlantic (New York, Pennsylvania, New Jersey); East North-Central (Michigan, Ohio, Indiana, Illinois, Wisconsin); West North-Central (North Dakota, Minnesota, South Dakota, Nebraska, Iowa, Kansas, Missouri); South (West Virginia, Delaware, Maryland, Kentucky, Tennessee, North Carolina, Arkansas, South Carolina, Mississippi, Alabama, Georgia, Louisiana, Florida); West (Montana, Idaho, Wyoming, Nevada, Utah, Colorado, Arizona, New Mexico, Texas, Oklahoma); Pacific (Washington, Oregon, California).

Religions: Catholic, Protestant, Jewish
Race: White, Black, Spanish

SOURCE: DeVries & Associates. Based on personal interviews with 4,047 adults Nov-Dec 1974. (Congressional Record, 3/24/75, H2225

G) Finally, Judith Blake indicates that the surveys show that:

- Women are more opposed to abortion than men;
- A strong majority of American women and men oppose abortion after three months;
- A strong majority of American women and men believe a husband's consent is necessary;
- A majority of Americans oppose abortions at the governments expense;
- Regardless of the data base, none of the results show as many as 50% of respondents approving and most surveys indicate that there are well below 50% (for elective abortions). "The electorate largely opposes much of the Court's ruling..."[3]

II. Public Opinion Polls Often Inaccurately Reflect the Views of the Public on Abortion or Any Other Issue

"...a high proportion of survey research sponsored by federal, state and local governments may be so poorly designed and shoddily executed that the results don't merit trust -- let alone conversion into policy." (Daniel S. Greenberg, "Surveying Those Surveys", Washington Post, 11/15/77. Reporting of the results of the National Science Foundation funded American Statistical Association study, designed to evaluate the design and execution of a representative sampling of surveys -- 26 by federal agencies and 10 by state and local governments and other organizations)

"...little agreement exists as to their (congressional polls) merits...". (Morris K. Udall and Donald G. Tacheron, The Job of the Congressman, (New York: Bobbs-Merrill Co., Inc., 1971), pp. 117).

Common inadequacies of public opinion polls which render their conclusions questionable include:

A) Survey Wording Inadequate (How the question is phrased.)

1) Leading Questions

a) Suggesting doing something desirable may invite a positive response:

> Example: In January 1978, a CBS News and New York Times survey asked, "Do you agree that government ought to help people to get doctor and hospital care at low cost?" Eighty-one percent agreed. Following this survey, the Opinion Research Corporation of Princeton, NJ, concluded another survey, just replacing "private enterprise" for "government" and 71% agreed.[4]

Example: A 1977 CBS-New York Times poll found that only 13% of Americans opposed "providing financial assistance for children raised in low-income homes where one parent is absent" and 18% opposed using tax money to "pay for health care for poor people." However, 58% opposed "most government sponsored welfare programs."[5]

Example: A Time magazine poll published on 11/21/77 found that 58% felt "government funds should not be used to finance elective abortions for the poor." (p. 115) While a New York Times-CBS poll released on 11/2/77 showed 47% favoring the government "help a poor woman with her bills if she wants an abortion", and 44% opposed.[6]

b) The sequence in which a question is asked may invite a positive (or negative) response. A series of questions pertaining to the health and well-being of the mother, and/or fetus, followed by a question about abortion, may elicit a different response than the latter question asked outright.

Example: The National Opinion Research Center asked the following question from 1972 through 1975: "Please tell me whether you think it should be possible for a pregnant woman to obtain a legal abortion if she is married and does not want any more children." This item appeared second in a list of questions on abortion beginning with the justification in terms of possible child deformity.[7]

2) Misleading Question

Example: Congressman Harold Colber (R, IL-6), in the summer of 1973, asked his constituents, "Do you approve of the Supreme Court ruling that abortions are permissible in certain circumstances?" Twenty-five percent responded "NO". It is not evident from the question how many respondents understood "certain circumstances" to mean that the court actually legalized all abortions during the first six months of pregnancy, as well as many abortions during the last months of pregnancy while the baby is capable of surviving premature birth.

Example: Congressman Thomas Rees (D, CA-26), in the summer of 1974, surveyed his constituents as follows: "A recent U.S. Supreme Court decision legalized abortions which are performed by qualified physicians during the early stages of pregnancy. This allows abortion to be a decision made by a woman and her doctor rather than regulated by the government." Eighty-five precent agreed with the Court's ruling. Of course abortions can be performed throughout pregnancy under the Court's decision. And reference to physicians performing them and doctors involved in the decision, implies that some medical need exists to warrant the abortion.

3) Oversimplified Question

This forces individuals to choose between two extremes, and consequently doesn't obtain an accurate view of their feelings.

Example! Congressman Steward McKinney, in a constituent poll asked "Do you favor a Constitutional Amendment prohibiting abortion?"[8] Seventy-four percent responded "no". His survey does not reveal how many responded "no" because they feel that abortion should be available in limited circumstances, such as when the mother's life is threatened by a continued pregnancy. Also, the survey does not reveal how many "no" responses were based on the belief that significant alternatives to amending the Constitution exist in order for abortion to be prohibited.

Example: An August, 1980 New York Times/CBS News Poll asked a random sample of Americans "Do you think there should be an amendment to the Constitution prohibiting abortions, or shouldn't there be such an amendment?" Only 29% favored it, while 62% were opposed and the rest were uncertain. Yet later, the same people were asked "Do you believe there should be an amendment to the Constitution protecting the life of the unborn child, or shouldn't there be such an amendment?" Here 50% were in favor, 39% opposed, and the rest undecided. (New York Times, 8/18/80, p. 1)

4) Sequential Questions Not Used

Sequential questions could indicate the knowledge the respondent has on the subject.

5) Large number of options to choose from may be heavily weighted in favor of one point of view.

B) Polling Sample Inadequate (Who was asked the question?)

For the poll to be representative of the general population, those surveyed must fit certain specific characteristics (e.g., income, age, race, sex, religion, education, location, etc.). If this is not done, then the survey findings are only applicable to the individuals being surveyed. "The bulk of the surveys they studied flunked on the critical matter of sample design, i.e., the selection of the few respondents who are supposed to represent the mass... The authors found that when response rates were low among the carefully selected target samples, some surveyors built up the numbers by interviewing 'substitutes' of their own selection -- an unthinkable contamination of the survey technique." Also, "no verification of interviewing, which means that no one checked on the authenticity of the returns brought back by the low-paid canvassers that do the actual surveying." (American Stat. Association study, op.cit.)

Example: An analysis of a constituent survey by Congressman John Murphy (D, NY-17) conducted in the fall of 1974, found that they tabulated only 300 replies from 20,000, and selected half of them to represent a section of his congressional district representing 33% of his constituents.[9]

Example: Polls conducted through magazines or newspapers in which readers are asked to respond with their views, obviously just reflect the views of the types of people who read the publication, and not the general public. Support for a Human Life Amendment would be strong among "Our Sunday Visitor" readers and weak among the readers of Ms. Magazine.

Example: Polls taken by telephone, because the poor and the young are harder to reach that way.

C) Individuals Surveyed Have Little or No Knowledge (Or Perhaps False Knowledge) of the Subject

Individuals who have little or no knowledge or false knowledge consequently cannot adequately respond. For example, when human life begins, fetal development, what the Supreme Court decided.

Example: Congressman Tom Tauke (R-IA-2) in April, 1979 sent out a questionnaire which included a question on abortion and referred to the "decision of 1973." Many constituents responded asking what decision that was.

Example: By 1975, less than half of American adults were informed about the 1973 Supreme Court decisions[10] As late as January 1978, even the President didn't know what the Supreme Court had done, saying, "Abortion is now legal in the first three months." (Yazoo County, Mississippi) An Associate Press-NBC poll on the ERA on 8/16/78 found that 10% of Americans had not heard or read of it.[11]

Example: Congressman Donald Brotzman (R,CO-2), in the summer of 1974, asked his constituents the following, "Do you favor an amendment to the Constitution which would reverse the most recent Supreme Court decision (Roe v. Wade) on abortion? Twenty-one percent responded yes. It is not known how many knew what the Supreme Court did.

D) Conclusions Are Drawn Which Are Not Supported by th Data

"One would hope that survey results bearing on controversial subjects of public policy would include enough evidence to support reported findings, including estimates of uncertainty. This is not generally the case." (American Statistical Association study, op.cit.)

In evaluating the polling done during the 1976 presidential campaign, Barry Sussman found: (a) failure to report the real findings of a poll. On at least three occasions the Gallup firm- for one reported partial poll results or analysis that on later examination proved to be at variance with the poll's complete findings; (b) drawing improper, sometimes wrong conclusions from apparently reliable data; or (c) departing from the data altogether.[12]

III. Public Opinion Should Not Be The Basis For Inalienable Rights

It really isn't relevant what the present, past or future public opinion polls on abortion reveal. The right to existence, the right to life is an inalienable right, and as such should not have to rest on current public opinion.

Those advocating abortion repeatedly advance the position that since a majority of Americans oppose a Human Life Amendment or are equally divided on the question, a consensus does not exist so it is unenforceable and should not be pursued. According to Germain G. Grisez, professor of philosophy at Georgetown University:

> "The principle underlying this argument is sound but its application here is fallacious. The underlying principle is that law is justified by reference to the good for which the community is organized. If a substantial segment of the community rejects some law, this usually indicates that the common ground on which the community has to be built does not extend quite so far as had been assumed. Therefore, that particular law represents a failure in attempt at community; it simply marks a limit beyond which general cooperation is not to be expected. Usually, the proper course is to recognize that the good to which this law was directed must be served by individual or voluntary group efforts. For

> the majority to continue to insist on a law in such circumstances would mean that the minority were compelled to a pseudo-cooperation toward an objective they did not see as an aspect of the common good."[13]

The reason this line of reasoning is fallacious respecting the issue of abortion is that it disregards first, the fundamental purpose of the community; second, the role of legislation in influencing community values; and third, the fact that abortion is simply unjust.

First, the American community was established, according to our Declaration of Independence, to secure inalienable rights, including life. Those advocating and supporting abortion are attempting to change our country's purpose. Why should those who maintain the founding principles are correct, voluntarily give them up?

Second, the Law plays a significant role in educating citizens, so the process of working for and ultimately passing a Human Life Amendment, may well develop the consensus referred to. What progress would have been made respecting civil rights, ending the Vietnam War, and providing equal opportunities, if pursuing these goals had been delayed until majority support occured? In each of these cases, it was precisely through the legislative process that some consensus was developed and ultimately, some acceptable legislation achieved.

It is not the task of a legislator in a representative democracy to simply tally the positions of the majority, rather to study the issues himself, weighing all the substantive factors, and to decide in reliance (at least in part) on his own wisdom. Although he is the voice of his constituents, he is also their leader. As such he is presumed more informed, if not wiser, than the average voter.

Thirdly, the existence of substantial dissent does not always show that enforcement of a law would be unjust. The Civil War marked the enforcement of federal primacy and the principle that slavery should be outlawed against a very "substantial body of decent opinion." The rights of slaves to liberty and the survivial of the federal union were at stake, and these factors justified the war in the eyes of Lincoln and those who followed him.[14]

Justice takes precedence over consensus, and it is unjust for an unborn child to be denied its life. It would remain unjust no matter how many people advocated it. And since it is unjust, it should be vigorously opposed, as slavery was, until it is made illegal.

FOOTNOTES

[1] Judith Blake, *Population and Development Review*, Vol 3, Nos. 1&2:47-51 (March and June 1977: cpt. 1977 by The Population Council, Inc.) Judith Blake is a professional demographer and social scientist. She formerly was the chairman of the Department of Demography at the University of California, Berkeley, and is presently Boxby Professor of Demography and Sociology at UCLA.

[2] Gallup surveys from 1975 and 1977, *Times-Union and Journal*, Jacksonville, FL, 1/28/78, p. E-5. The language in parenthesis was either changes or added language by Gallup for 1975, 1977, 1979 and 1980.

[3] Blake, op. cit., pp. 48-61.

[4] James J. Kilpatrick, "The Game of Polling", *Washington Star*, 8/17/78.

[5] Msgr. R. G. Peters, "A Poll Depends on the Way You Phrase It", *National Catholic Register*, 10/2/77.

[6] *NC News Service*, 2/2/77, p.9.

[7] Judith Blake, op. cit., pp. 48-49.

[8] Congressional Record, 11/2/77, E 6788.

[9] Lifeletter #7, Ad Hoc Committee in Defense of Life, 1975.

[10] Ibid.

[11] *NC News Service*, 8/16/78, p. 18.

[12] Barry Sussman, "The Perils of Flawed Polls", *Washington Post*, 1/30/77, p. C-1.

[13] Germain Grisez, *Abortion: The Myths, the Realities, and the Arguments*, (New York; Corpus Books, 1972), p. 446.

[14] Ibid.

PART 3.--SUPREME COURT DECISIONS

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ROE ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 70-18. Argued December 13, 1971—Reargued October 11, 1972—Decided January 22, 1973

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford. *Held:*

1. While 28 U. S. C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical. P. 8.

2. Roe has standing to sue; the Does and Hallford do not. Pp. 9–14.

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(a) Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages and not simply when the action is initiated. Pp. 9–10.

(b) The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertable as a defense against the good-faith state prosecutions pending against him. *Samuels* v. *Mackell*, 401 U. S. 66.

(c) The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Pp. 12–14.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. Pp. 36–49.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Pp. 36–47.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. Pp. 43–44.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Pp. 44–48.

4. The State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any

Syllabus

abortion by a person who is not a physician as so defined. Pp. 34-35, 48.

5. It is unnecessary to decide the injunctive relief issue since the Texas authorities will doubtless fully recognize the Court's ruling that the Texas criminal abortion statutes are unconstitutional. P. 51.

314 F. Supp. 1217, affirmed in part and reversed in part.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., and DOUGLAS and STEWART, JJ., filed concurring opinions. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined. REHNQUIST, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70-18

Jane Roe et al., Appellants, *v.* Henry Wade.	On Appeal from the United States District Court for the Northern District of Texas.

[January 22, 1973]

Mr. Justice Blackmun delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, *Doe* v. *Bolton, post* ——, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortive procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now vindicated dissent in *Lochner* v. *New York*, 198 U. S. 45, 76 (1905):

> "It [the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

I

The Texas statutes that concern us here are Arts. 1191–1194 and 1196 of the State's Penal Code.[1] These

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[1] "Article 1191. Abortion

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

"Art. 1192. Furnishing the means

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

"Art. 1193. Attempt at abortion

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.[2]

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it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

"Art. 1194. Murder in producing abortion

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

"Art. 1196. By medical advice

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

The foregoing Articles, together with Art. 1195, comprise Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

[2] Ariz. Rev. Stat. Ann. § 13-211 (1971); Conn. Pub. Act. No. 1 (May 1972 special session) (in 4 Conn. Leg. Serv. 677 (1972)), and Conn. Gen. Stat. Rev. §§ 53-29, 53-30 (1968) (or unborn child); Idaho Code § 18-1505 (App. to Supp. 1971); Ill. Rev. Stats. c. 38, § 23-1 (1971); Ind. Code § 35-1-58-1 (1971); Iowa Code § 701.1 (1971); Ky. Rev. Stat. § 436.020 (1963); La. Rev. Stat. § 37:1285 (6) (1964) (loss of medical license) (but see § 14-87 (1972 Supp.) containing no exception for the life of the mother under the criminal statute); Me. Rev. Stat. Ann. Tit. 17, § 51 (1964); Mass. Gen. Laws Ann. c. 272, § 19 (1970) (using the term "unlawfully," construed to exclude an abortion to save the mother's life, *Kudish* v. *Bd. of Registration*, 356 Mass. 98, 248 N. E. 2d 264 (1969)); Mich. Comp. Laws § 750.14 (1948); Minn. Stat. § 617.18 (1971); Mo. Rev. Stat. § 559.100 (1969); Mont. Rev. Codes Ann. § 94-401 (1961); Neb. Rev. Stat. § 28-405 (1964); Nev. Rev. Stat. § 200:220 (1967); N. H. Rev. Stat. Ann. § 585.13 (1955); N. J. Stat. Ann. § 2A:87-1 (1969) ("without lawful justification"); N. D. Cent. Code §§ 12-25-

Texas first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 Gammel, Laws of Texas, 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, Arts. 531–536; Paschal's Laws of Texas, Arts. 2192–2197 (1866); Texas Rev. Stat., Arts. 536–541 (1879); Texas Rev. Crim. Stat., Arts. 1071–1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother." [3]

01, 12-25-02 (1960); Ohio Rev. Code § 2901.16 (1953); Okla. Stat. Ann., Tit. 21, § 861 (1972–1973 Supp.); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963) ("unlawful"); R. I. Gen. Laws Ann. § 11-3-1 (1969); S. D. Compiled Laws § 22-17-1 (1967); Tenn. Code Ann. §§ 39-301, 39-302 (1956); Utah Code Ann. §§ 76-2-1, 76-2-2 (1953); Vt. Stat. Ann., Tit. 13, § 101 (1958); W. Va. Code Ann. § 61-2-8 (1966); Wis. Stat. § 940.04 (1969); Wyo. Stat. Ann. §§ 6-77, 6-78 (1957).

[3] Long ago a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only,

"It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void in that it does not sufficiently define or describe the offense of abortion. We do not concur in respect to this question." *Jackson* v. *State*, 55 Tex. Crim. R. 79, 89, 115 S. W. 262, 268 (1908).

The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overbroad. *Thompson* v. *State*, — Tex. Crim. App. —, — S. W. 2d — (1971), appeal pending. The court held that "the State of Texas has a compelling interest to protect fetal life"; that Art. 1191 "is designed to protect fetal life"; that the Texas homicide statutes, particularly Art. 1205 of the Penal Code, are intended to protect a person "in existence by actual birth" and thereby implicitly recognize other human life that is not "in existence by actual birth"; that the definition of human life is for the legislature and not the courts; that Art. 1196 "is

II

Jane Roe,[4] a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint Roe purported to sue "on behalf of herself and all other women" similarly situated.

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In

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more definite that the District of Columbia statute upheld in [*United States* v.] *Vuitch*" (402 U. S. 62); and that the Texas statute "is not vague and indefinite or overbroad." A physician's abortion conviction was affirmed.

In n. 2, — Tex. Crim. App., at —, — S. W. 2d, at —, the court observed that any issue as to the burden of proof under the exemption of Art. 1196 "is not before us." But see *Veevers* v. *State*, 172 Tex. Crim. App. 162, 168–169, 354 S. W. 2d 161 (1962). Cf. *United States* v. *Vuitch*, 402 U. S. 62, 69–71 (1971).

[4] The name is a pseudonym.

his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe,[5] a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single woman, the childless couple, with the wife not pregnant, and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made to dismiss and for summary judgment. The court held that Roe and Dr. Hallford, and members of their respective classes, had standing to sue, and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Doe complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F. Supp. 1217 (ND Tex. 1970).

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[5] These names are pseudonyms.

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U. S. C. § 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U. S. 941 (1971).

III

It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in *Mitchell* v. *Donovan*, 398 U. S. 427 (1970), and *Gunn* v. *University Committee*, 399 U. S. 333 (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See *Carter* v. *Jury Commission*, 396 U. S. 320 (1970); *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 80–81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. *Doe* v. *Bolton*, *post*, —.

IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast* v. *Cohen*, 392 U. S. 83, 101 (1968), and *Sierra Club* v. *Morton*, 405 U. S. 727, 732 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

A. *Jane Roe.* Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. *Abele* v. *Markle,* 452 F. 2d 1121, 1125 (CA2 1971); *Crossen* v. *Breckenridge,* 446 F. 2d 833, 838–839 (CA6 1971); *Poe* v. *Menghini,* 339 F. Supp. 986, 990–991 (Kans. 1972). See *Truax* v. *Raich,* 239 U. S. 33 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen,* 392 U. S., at 102, and the necessary degree of contentiousness, *Golden* v. *Zwickler,* 394 U. S. 103 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970,[6] or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

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[6] The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Appellee's Brief 13. The docket entries, Appendix, at 2, and the transcript, Appendix, at 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. See Appendix, at 77.

The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950); *Golden* v. *Zwickler, supra*; *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403 (1972).

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). See *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969); *Carroll* v. *President and Commissioners*, 393 U. S. 175, 178-179 (1968); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632-633 (1953).

We therefore agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

B. *Dr. Hallford.* The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor alleging in his complaint that he:

> "In the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs.

> James H. Hallford, No. C-69-5307-IH, and (2) The State of Texas vs. James H. Hallford, No. C-69-2524-H. In both cases the defendant is charged with abortion. . . ."

In his application for leave to intervene the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

Dr. Hallford is therefore in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad faith prosecution. In order to escape the rule, articulated in the cases cited in the next paragraph of this opinion, that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a "potential future defendant" and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in *Samuels* v. *Mackell*, 401 U. S. 66 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injuctive relief to the doctor. The reasons supportive of that action, however, are those expressed in *Samuels* v. *Mackell*, *supra*, and in *Younger* v.

Harris, 401 U. S. 37 (1971); *Boyle* v. *Landry*, 401 U. S. 77 (1971); *Perez* v. *Ledesma*, 401 U. S. 82 (1971); and *Byrne* v. *Karalexis*, 401 U. S. 216 (1971). See also *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). We note, in passing, that *Younger* and its companion cases were decided after the three-judge District Court decision in this case.

Dr. Hallford's complaint in intervention, therefore, is to be dismissed.[7] He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

C. *The Does.* In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But they "fear . . . they may face the prospect of becoming parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

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[7] We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further for it asserts that plaintiff Roe does not adequately protect the interest of the doctor "and the class of people who are physicians . . . and the class of people who are . . . patients . . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F. Supp., at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that sometime, in the future, Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future, she might want an abortion that might then be illegal under the Texas statutes.

This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. *Younger* v. *Harris*, 401 U. S., at 41-42; *Golden* v. *Zwickler*, 394 U. S., at 109-110 (1969); *Abele* v. *Markle*, 452 F. 2d, at 1124-1125; *Crossen* v. *Breckenridge*, 446 F. 2d, at 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, *Investment Co. Institute* v. *Camp*, 401 U. S. 617 (1971);

Data Processing Service v. *Camp*, 397 U. S. 150 (1970); and *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). See also *Truax* v. *Raich*, *supra*.

The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *id.*, at 460 (WHITE, J., concurring); or among those rights reserved to the people by the Ninth Amendment, *Griswold* v. *Connecticut*, 381 U. S., at 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

1. *Ancient attitudes.* These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished.[8] We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era,[9] and that "it was resorted to without scruple."[10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable.[11] Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.[12]

2. *The Hippocratic Oath.* What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B. C.), who has been described as the Father of Medicine, the "wisest and the greatest

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[8] A. Castiglioni, A History of Medicine 84 (2d ed. 1947), E. Krumbhaar, translator and editor (hereinafter "Castiglioni").

[9] J. Ricci, The Genealogy of Gynaecology 52, 84, 113, 149 (2d ed. 1950) (hereinafter "Ricci"); L. Lader, Abortion 75-77 (1966) (hereinafter "Lader"); K. Niswander, Medical Abortion Practices in the United States, in Abortion and the Law 27, 38-40 (D. Smith, editor, 1967); G. Williams, The Sanctity of Life 148 (1957) (hereinafter "Williams"); J. Noonan, An Almost Absolute Value in History, in The Morality of Abortion 1, 3-7 (J. Noonan ed. 1970) (hereinafter "Noonan"); E. Quay, Justifiable Abortion—Medical and Legal Foundations, II, 49 Geo. L. J. 395, 406-422 (1961) (hereinafter "Quay").

[10] L. Edelstein, The Hippocratic Oath 10 (1943) (hereinafter "Edelstein"). But see Castiglioni 227.

[11] Edelstein 12; Ricci 113-114, 118-119; Noonan 5.

[12] Edelstein 13-14.

practioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past?[13] The Oath varies somewhat according to the particular translation, but in any translation the content is clear: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion,"[14] or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."[15]

Although the Oath is not mentioned in any of the principal briefs in this case or in *Doe* v. *Bolton*, *post*, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory:[16] The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, *Republic*, V, 461; Aristotle, *Politics*, VII, 1335 b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines," and "[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity."[17]

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[13] Castiglioni 148.

[14] *Id.*, at 154.

[15] Edelstein 3.

[16] *Id.*, at 12, 15–18.

Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (130–200 A. D.) "give evidence of the violation of almost every one of its injunctions."[18] But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct."[19]

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long accepted and revered statement of medical ethics.

3. *The Common Law.* It is undisputed that at the common law, abortion performed *before* "quickening"—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy[20]—was not an indictable offense.[21] The ab-

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[17] *Id.*, at 18; Lader 76.

[18] Edelstein 63.

[19] *Id.*, at 64.

[20] Dorland's Illustrated Medical Dictionary 1261 (24th ed. 1965).

[21] E. Coke, Institutes III *50 (1648); 1 W. Hawkins, Pleas of the Crown c. 31, § 16 (1762); 1 Blackstone, Commentaries *129–130 (1765); M. Hale, Pleas of the Crown 433 (1778). For discussions of the role of the quickening concept in English common law, see Lader 78; Noonan 223–226; C. Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case

sence of a common law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth.[22] This was "mediate animation." Although

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of Cessation of Constitutionality, 14 N. Y. L. Forum 411, 418–428 (1968) (hereinafter "Means I"); L. Stern, Abortion: Reform and the Law, 59 J. Crim. L. C. & P. S. 84 (1968) (hereinafter "Stern"); Quay 430–432; Williams 152.

[22] Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female. See, for example, Aristotle, Hist. Anim. 7.3.583b; Gen. Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat. Puer., No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between *embryo inanimatus*, not yet endowed with a soul, and *embryo animatus*. He may have drawn upon Exodus xxi, 22. At one point, however, he expresses the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, De Origine Animae 4.4 (Pub. Law 44.527). See also Reany, The Creation of the Human Soul, c. 2 and 83–86 (1932); Huser, The Crime of Abortion in Common Law 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D. C. 1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426–427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10, Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40–80 day view, and perhaps to Acquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common law scholars and found its way into the received common law in this country.

Whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide.[23] But the later and predominant view, following the great common law scholars, has been that

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in 1 Corpus Juris Canonici 1122, 1123 (2d ed. Friedberg ed. 1879). Gratian, together with the decretals that followed, were recognized as the definitive body of canon law until the new Code of 1917.

For discussions of the canon law treatment, see Means I, at 411–412; Noonan, 20–26; Quay 426–430; see also Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18–29 (1965).

[23] Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated, and particularly if it be animated." 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened." II Bracton, On the Laws and Customs of England 341 (Thorne ed. 1968). See Quay 431; see also 2 Fleta 60–61 (Book I, c. 23) (Selden Society ed. 1955).

it was at most a lesser offense. In a frequently cited passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision and no murder."[24] Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view.[25] A recent review of the common law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common law crime.[26] This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law,[27] others followed Coke in stating that abortion of a quick fetus was a "misprision," a term they translated to mean "misdemeanor." [28] That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus.

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[24] E. Coke, Institutes III *50 (1648).

[25] 1 Blackstone, Commentaries *129-130 (1765).

[26] C. Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N. Y. L. Forum 335 (1971) (hereinafter "Means II"). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings against abortion, coupled with his determination to assert common law (secular) jurisdiction to assess penalties for an offence that traditionally had been an exclusively ecclesiastical or canon law crime. See also Lader 78-79, who notes that some scholars doubt the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 1, at 203, referred to in the text, *infra*, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

[27] *Commonwealth* v. *Bangs*, 9 Mass. 387, 388 (1812); *Commonwealth* v. *Parker*, 50 Mass. (9 Met.) 263, 265-266 (1845); *State* v. *Cooper*, 22 N. J. L. 52, 58 (1849); *Abrams* v. *Foshee*, 3 Iowa 274, 278-280 (1856); *Smith* v. *Gaffard*, 31 Ala. 45, 51 (1857); *Mitchell*

4. *The English statutory law.* England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but in § 2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the quickening distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13, at 104. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vic., c. 85, § 6, at 360, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vic., c. 100, § 59, at 438, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929 the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that

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v. *Commonwealth*, 78 Ky. 204, 210 (1879); *Eggart* v. *State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898); *State* v. *Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901); *Edwards* v. *State*, 79 Neb. 251, 252, 112 N. W. 611, 612 (1907); *Gray* v. *State*, 77 Tex. Crim. R. 221, 224, 178 S. W. 337, 338 (1915); *Miller* v. *Bennett*, 190 Va. 162, 169, 56 S. E. 2d 217, 221 (1949). Contra, *Mills* v. *Commonwealth*, 13 Pa. 631, 633 (1850); *State* v. *Slagle*, 83 N. C. 630, 632 (1880).

[28] See *Smith* v. *State*, 33 Me. 48, 55 (1851); *Evans* v. *People*, 49 N. Y. 86, 88 (1872); *Lamb* v. *State*, 67 Md. 524, 533, 10 A. 208 (1887).

one was not to be found guilty of the offense "unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of *Rex* v. *Bourne*, [1939] 1 K. B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury Judge Macnaghten referred to the 1929 Act, and observed, p. 691, that that Act related to "the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature." *Id.*, at 91. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's *health*, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good faith belief that the abortion was necessary for this purpose. *Id.*, at 693–694. The jury did acquit.

Recently Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably forseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. *The American law.* In this country the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child." [29] The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860.[30] In 1828 New York enacted legislation [31] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." By 1840, when Texas had received the common law,[32] only eight American States

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[29] Conn. Stat., Tit. 20, § 14 (1821).

[30] Conn. Pub. Acts, c. 71, § 1 (1860).

[31] N. Y. Rev. Stat., pt. IV, c. I, Tit. II, Art. 1, § 9, at 661, and Tit. VI, § 21, at 694 (1829).

[32] Act of January 20, 1840, § 1, set forth in 2 Gammel, Laws of Texas 177–178 (1898); see *Grigsby* v. *Reib*, 105 Tex. 597, 600, 153 S. W. 1124, 1125 (1913).

had statutes dealing with abortion.[33] It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the States banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.[34] The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health.[35] Three other States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts.[36] In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3,[37] set forth as Appendix B to the opinion in *Doe* v. *Bolton, post* ——.

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[33] The early statutes are discussed in Quay 435–438. See also Lader 85–88; Stern 85–86; and Means II 375–376.

[34] Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447-520. See Note, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 Ill. L. Forum 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.

[35] Ala. Code, Tit. 14, § 9 (1958); D. C. Code Ann. § 22-201 (1967).

[36] Mass. Gen. Laws Ann., c. 272, § 19 (1970); N. J. Rev. Stat. Ann. 2A:87-1 (1969); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963).

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

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[37] Fourteen States have adopted some form of the ALI statute. See Ark. Stat. Ann. §§ 41-303 to 41-310 (Supp. 1971); Calif. Health and Safety Code §§ 25950-25955.5 (West Supp. 1972); Colo. Rev. Stats. Ann. §§ 40-2-50 to 40-2-53 (Perm. Cum. Supp. 1967); Del. Code Ann., Tit. 24, §§ 1790-1793 (Supp. 1972); Florida Law of Apr. 13, 1972, c. 72-196, 1972 Fla. Sess. Law Serv., at 380-382; Ga. Code §§ 26-1201 to 26-1203 (1972); Kan. Stat. Ann. § 21-3407 (Supp. 1971); Md. Ann. Code, Art. 43, §§ 137-139 (Repl. 1971); Miss. Code Ann. § 2223 (Supp. 1972); N. M. Stat. Ann. §§ 40A-5-1 to 40A-5-3 (Repl. 1972); N. C. Gen. Stat. § 14-45.1 (Supp. 1971); Ore. Rev. Stat. §§ 435.405 to 435.495 (1971); S. C. Code Ann. §§ 16-82 to 16-89 (Supp. 1971); Va. Code Ann. §§ 18.1-62 to 18.1-62.3 (Supp. 1972). Mr. Justice Clark described some of these States as having "led the way." Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loyola U. (L. A.) L. Rev. 1, 11 (1969).

By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw. Rev. Stat. § 453-16 (Supp. 1971); N. Y. Penal Code § 125.05 (McKinney Supp. 1972-1973); Wash. Rev. Code §§ 9.02.060 to 9.02.080 (Supp. 1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

6. *The position of the American Medical Association.* The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am. Med. Assn. 73–77 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes "of this general demoralization":

> "The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.
>
> "The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life . . . .
>
> "The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it,

> and to its life as yet denies all protection." *Id.*, at 75–76.

The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.*, at 28, 78.

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 Trans. of the Am. Med. Assn. 258 (1871). It proffered resolutions, adopted by the Association, *id.*, at 38–39, recommending, among other things, that it "be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child—if that be possible," and calling "the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females—aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient," and two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing," and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates, 40-51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;" and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles.[38] Proceedings of the AMA House of Delegates 221 (June 1970). The AMA Judicial Council rendered a complementary opinion.[39]

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[38] "Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient

7. *The position of the American Public Health Association.* In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

> "a. Rapid and simple abortion referral must be readily available through state and local public

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since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demand; and

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative according to the merits of each individual case; therefore be it

"*RESOLVED*, That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State, and be it further

"*RESOLVED*, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice." Proceedings of the AMA House of Delegates 221 (June 1970).

[39] "The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

health departments, medical societies, or other nonprofit organizations.

"b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.

"c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.

"d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.

"e. Contraception and/or sterilization should be discussed with each abortion patient." Recommended Standards for Abortion Services, 61 Am. J. Pub. Health 396 (1971).

Among factors pertinent to life and health risks associated with abortion were three that "are recognized as important":

"a. the skill of the physician,

"b. the environment in which the abortion is performed, and above all

"c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history." *Id.*, at 397.

It was said that "a well-equipped hospital" offers more protection "to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance." Thus it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." *Id.*, at 398.

8. *The position of the American Bar Association.* At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A. B. A. J. 380 (1972). We set forth the Act in full in the margin.[40] The

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[40] "UNIFORM ABORTION ACT

"SECTION 1. [*Abortion Defined; When Authorized.*]

"(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

"(b) An abortion may be performed in this state only if it is performed:

"(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, or political subdivision of either;] or by a female upon herself upon the advice of the physician; and

"(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years of age].

"SECTION 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony]

Conference has appended an enlightening Prefatory Note.[41]

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

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and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

"SECTION 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

"SECTION 4. [*Short Title.*] This Act may be cited as the Uniform Abortion Act.

"SECTION 5. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

"SECTION 6. [*Repeal.*] The following acts and parts of acts are repealed:

"(1)
"(2)
"(3)

"SECTION 7. [*Time of Taking Effect.*] This Act shall take effect————————."

[41] "This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously.[42] The appellants and *amici* contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman.[43] This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dila-

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in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same."

[42] See, for example, *YWCA* v. *Kugler*, 342 F. Supp. 1048, 1074 (N. J. 1972); *Abele* v. *Markle*, 342 F. Supp. 800, 805–806 (Conn. 1972) (Newman, J., concurring), appeal pending; *Walsingham* v. *Florida*, 250 So. 2d 857, 863 (Ervin, J., concurring) (Fla. Supp. 1972); *State* v. *Gedicke*, 43 N. J. L. 86, 80 (Sup. Ct. 1881); Means II, at 381–382.

[43] See C. Haagensen & W. Lloyd, A Hundred Years of Medicine 19 (1943).

tion and curettage were not nearly so safe as they are today. Thus it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.[44] Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the area of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

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[44] Potts, Postconception Control of Fertility, 8 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); Abortion Mortality, 20 Morbidity and Morality, 208, 209 (July 12, 1971) (U. S. Dept. of HEW, Public Health Service) (New York City); Tietze, United States: Therapeutic Abortions, 1963–1968, 59 Studies in Family Planning 5, 7 (1970); Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze & Lehfeldt, Legal Abortion in Eastern Europe, 175 J. A. M. A. 1149, 1152 (April 1961). Other sources are discussed in Lader 17–23.

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception.[45] The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life.[46] Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.[47] The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.[48] Proponents of this view point out that in many States, including Texas,[49] by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.[50] They claim that adoption of the "quickening" distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

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[45] See Brief of Amicus National Right to Life Foundation; R. Drinan, The Inviolability of the Right to Be Born, in Abortion and the Law 107 (D. Smith, editor, 1967); Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 UCLA L. Rev. 233 (1969); Noonan 1.

[46] See, *e. g.*, *Abele* v. *Markle*, 342 F. Supp. 800 (Conn. 1972), appeal pending.

It is with these interests, and the weight to be attached to them, that this case is concerned.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co.* v. *Botsford,* 141 U. S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or individual Justices have indeed found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry* v. *Ohio,* 392 U. S. 1, 8–9 (1968), *Katz* v. *United States,* 389 U. S. 347, 350 (1967), *Boyd* v. *United States,* 116 U. S. 616 (1886), see *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928) (Brandeis, J. dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut,* 381 U. S. 479, 484–485 (1965); in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia,* 388 U. S. 1, 12 (1967), procreation, *Skinner* v. *Oklahoma,* 316 U. S. 535, 541–542 (1942), contraception, *Eisenstadt* v. *Baird,* 405 U. S. 438, 453–454 (1972); *id.*, at 460, 463–465 (WHITE, J., concurring), family relationships, *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944), and child rearing and education, *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925), *Meyer* v. *Nebraska, supra.*

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[47] See discussions in Means I and Means II.

[48] See, *e. g.*, *State* v. *Murphy*, 27 N. J. L. 112, 114 (1858).

[49] *Watson* v. *State*, 9 Tex. App. 237, 244–245 (1880); *Moore* v. *State*, 37 Tex. Crim. R. 552, 561, 40 S. W. 287, 290 (1897); *Shaw* v. *State*, 73 Tex. Crim. R. 337, 339, 165 S. W. 930, 931 (1914); *Fondren* v. *State*, 74 Tex. Crim. R. 552, 557, 169 S. W. 411, 414 (1914); *Gray* v. *State*, 77 Tex. Crim. R. 221, 229, 178 S. W. 337, 341 (1915). There is no immunity in Texas for the father who is not married to the mother. *Hammett* v. *State*, 84 Tex. Crim. R. 635, 209 S. W. 661 (1919); *Thompson* v. *State*, — Tex. Crim. R. — (1971), appeal pending.

[50] See *Smith* v. *State*, 33 Me. 48, 55 (1851); *In re Vince*, 2 N. J. 443, 450, 67 A. 2d 141, 144 (1949). A short discussion of the modern law on this issue is contained in the Comment to the ALI's Model Penal Code § 207.11, at 158 and nn. 35–37 (Tent. Draft No. 9, 1959).

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellants and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellants' arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, is unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson* v. *Massachusetts,* 197 U. S. 11 (1905) (vaccination); *Buck* v. *Bell,* 274 U. S. 200 (1927) (sterilization).

We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgement of rights. *Abele* v. *Markle,* 342 F. Supp. 800 (Conn. 1972), appeal pending; *Abele* v. *Markle,* — F. Supp. — (Conn. Sept. 20, 1972), appeal pending; *Doe* v. *Bolton,* 319 F. Supp. 1048 (ND Ga. 1970), appeal decided today, *post* —; *Doe* v. *Scott,* 321 F. Supp. 1385 (ND Ill. 1971), appeal pending; *Poe* v. *Menghini,* 339 F. Supp. 986 (Kan. 1972); *YWCA* v. *Kugler,* 342 F. Supp. 1048 (NJ 1972); *Babbitz* v. *McCann,* 310 F. Supp. 293 (ED Wis. 1970), appeal dismissed, 400 U. S. 1 (1970); *People* v. *Belous,* 71 Cal. 2d 954, 458 P. 2d 194 (1969), cert. denied, 397 U. S. 915 (1970); *State* v. *Barquet,* 262 S. 2d 431 (Fla. 1972).

Others have sustained state statutes. *Crossen* v. *Attorney General,* 344 F. Supp. 587 (ED Ky. 1972), appeal pending; *Rosen* v. *Louisiana State Board of Medical Examiners,* 318 F. Supp. 1217 (ED La. 1970), appeal pending; *Corkey* v. *Edwards,* 322 F. Supp. 1248

(WDNC 1971), appeal pending; *Steinberg* v. *Brown*, 321 F. Supp. 741 (ND Ohio 1970); *Doe* v. *Rampton*, — F. Supp. — (Utah 1971), appeal pending; *Cheaney* v. *Indiana*, — Ind. —, 285 N. E. 2d 265 (1972); *Spears* v. *State*, 257 So. 2d 876 (Miss. 1972); *State* v. *Munson*, — S. D. —, 201 N. W. 2d 123 (1972), appeal pending.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer* v. *Union Free School District*, 395 U. S. 621, 627 (1969); *Shapiro* v. *Thompson*, 394 U. S. 618, 634 (1969), *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold* v. *Connecticut*, 381 U. S. 479, 485 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 508 (1964); *Cantwell* v. *Connecticut*, 310 U. S. 296, 307–308 (1940); see *Eisenstadt* v. *Baird*, 405 U. S. 438, 460, 463–464 (1972) (WHITE, J., concurring).

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interest in protecting health and potential life and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the defendant presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F. Supp., at 1222–1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. The appellant conceded as much on reargument.[51] On the other hand, the appellee conceded on reargument[52] that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for representatives and senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3;[53] in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave cl. 3; and in the Fifth, Twelfth, and Twenty-second Amendments as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.[54]

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[51] Tr. of Rearg. 20–21.

[52] Tr. of Rearg. 24.

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[53] We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

[54] When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed

All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.[55] This is in accord with the results ~~reached~~ in those few cases where the issue has been squarely presented. *McGarvey* v. *Magee-Womens Hospital*, 340 F. Supp. 751 (WD Pa. 1972); *Byrn* v. *New York City Health & Hospitals Corp.*, 31 N. Y. 2d 194, 286 N. E. 2d 887 (1972), appeal pending; *Abele* v. *Markle*, — F. Supp. — (Conn. Sept. 20, 1972), appeal pending. Compare *Cheaney* v. *Indiana*, — Ind. —, 285 N. E. 265, 270 (1972); *Montana* v. *Rogers*, 278 F. 2d 68, 72 (CA7 1960), aff'd *sub nom. Montana* v. *Kennedy*, 366 U. S. 308 (1961); *Keeler* v. *Superior Court*, — Cal. —, 470 P. 2d 617 (1970); *State* v. *Dickinson*, 23 Ohio App. 2d 259, 275 N. E. 2d 599 (1970). Indeed, our decision in *United States* v. *Vuitch*, 402 U. S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if

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by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

[55] Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the time of conception until it is born alive," Wis. Stat. § 940.04 (6) (1969), and the new Connecticut statute, Public Act No. 1, May 1972 Special Session, declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary, 478–479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt, Griswold, Stanley, Loving, Skinner, Pierce,* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics.[56] It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.[57] It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family.[58] As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception or upon live birth or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb albeit with artificial aid.[59] Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.[60] The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception.[61] The latter is now, of course, the official belief of the Catholic Church. As one of the briefs *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.[62]

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[56] Edelstein 16.

[57] Lader 97–99; D. Feldman, Birth Control in Jewish Law 251–294 (1968). For a stricter view, see I. Jakobovits, Jewish Views on Abortion, in Abortion and the Law 124 (D. Smith ed. 1967).

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[58] Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99–101.

[59] L. Hellman & J. Pritchard, Williams Obstetrics 493 (14th ed. 1971); Dorland's Illustrated Medical Dictionary 1689 (24th ed. 1965).

[60] Hellman & Pritchard, *supra*, n. 58, at 493.

[61] For discussions of the development of the Roman Catholic position, see D. Callahan, Abortion: Law, Choice and Morality 409–447 (1970); Noonan 1.

In areas other than criminal abortion the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law had denied recovery for prenatal injuries even though the child was born alive.[63] That rule has been changed in almost every jurisdiction. In most States recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held.[64] In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries.[65] Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*.[66] Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

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[62] See D. Brodie, The New Biology and the Prenatal Child, 9 J. Fam. L. 391, 397 (1970); R. Gorney, The New Biology and the Future of Man, 15 UCLA L. Rev. 273 (1968); Note, Criminal Law—Abortion—The "Morning-After" Pill and Other Pre-Implantation Birth-Control Methods and the Law, 46 Ore. L. Rev. 211 (1967); G. Taylor, The Biological Time Bomb 32 (1968); A. Rosenfeld, The Second Genesis 138–139 (1969); G. Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 Mich. L. Rev. 127 (1968); Note, Artificial Insemination and the Law, U. Ill. L. F. 203 (1968).

[63] Prosser, Handbook of the Law of Torts 335–338 (1971); 2 Harper & James, The Law of Torts 1028–1031 (1956); Note, 63 Harv. L. Rev. 173 (1949).

[64] See cases cited in Prosser, *supra*, n. 62, at 336–338; Annotation, Action for Death of Unborn Child, 15 A. L. R. 3d 992 (1967).

[65] Prosser, *supra*, n. 62, at 338; Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 354–360 (1971).

X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact, referred to above at p. 34, that until the end of the first trimester mortality in abortion is less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

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[66] D. Louisell, Abortion, The Practice of Medicine, and the Due Process of Law, 16 UCLA L. Rev. 233, 235–238 (1969); Note, 56 Iowa L. Rev. 994, 999–1000 (1971); Note, The Law and the Unborn Child, 46 Notre Dame Law. 349, 351–354 (1971).

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See *United States* v. *Vuitch,* 402 U. S. 62, 67-72 (1971).

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term "physician," as it has been employed in the preceding numbered paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.

In *Doe* v. *Bolton, post,* procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together.[67]

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and example of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be stricken separately, for then the State is left with a statute proscribing all abortion procedures no matter how medically urgent the case.

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[67] Neither in this opinion nor in *Doe* v. *Bolton*, *post*, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, 1B N. C. Gen. Stat. § 14-45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N. C. A. G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

Although the District Court granted plaintiff Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler* v. *Koota,* 389 U. S. 241, 252-255 (1967); *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger* v. *Harris,* 401 U. S., at 50.

We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects the judgment of the District Court is affirmed. Costs are allowed to the appellee.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 70-18 and 70-40

Jane Roe et al., Appellants, 70-18 *v.* Henry Wade.	On Appeal from the United States District Court for the Northern District of Texas.
Mary Doe et al., Appellants, 70-40 *v.* Arthur K. Bolton, as Attorney General of the State of Georgia, et al.	On Appeal from the United States District Court for the Northern District of Georgia.

[January 22, 1973]

Mr. Chief Justice Burger, concurring.

I agree that, under the Fourteenth Amendment to the Constitution, the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions necessary to protect the health of pregnant women, using the term health in its broadest medical context. See *Vuitch* v. *United States*, 402 U. S. 62, 71-72 (1971). I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts.

In oral argument, counsel for the State of Texas informed the Court that early abortive procedures were routinely permitted in certain exceptional cases, such as nonconsensual pregnancies resulting from rape and incest. In the face of a rigid and narrow statute, such as that of Texas, no one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion. Of course, States must have broad power, within the limits indicated in the opinions, to regulate the subject of abortions, but where the consequences of state intervention are so severe, uncertainty must be avoided as much as possible. For my part, I would be inclined to allow a State to require the certification of two physicians to support an abortion, but the Court holds otherwise. I do not believe that such a procedure is unduly burdensome, as are the complex steps of the Georgia statute, which require as many as six doctors and the use of a hospital certified by the JCAH.

I do not read the Court's holding today as having the sweeping consequences attributed to it by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortion on demand.

SUPREME COURT OF THE UNITED STATES

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Jane Roe et al., Appellants, 70-18 *v.* Henry Wade.	On Appeal from the United States District Court for the Northern District of Texas.
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[January 22, 1973]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court,[1] I add a few words.

The questions presented in the present cases go far beyond the issues of vagueness, which we considered in *United States* v. *Vuitch*, 402 U. S. 62. They involve the right of privacy, one aspect of which we considered in *Griswold* v. *Connecticut*, 381 U. S. 479, 484, when we held that various guarantees in the Bill of Rights create zones of privacy.[2]

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[1] I disagree with the dismissal of Dr. Hallford's complaint in intervention in *Roe* v. *Wade*, because my disagreement with *Younger* v. *Harris*, 401 U. S. 37, revealed in my dissent in that case, still persists and extends to the progeny of that case.

[2] There is no mention of privacy in our Bill of Rights but our decisions have recognized it as one of the fundamental values those amendments were designed to protect. The fountainhead case is *Boyd* v. *United States*, 116 U. S. 616, holding that a federal statute which authorized a court in tax cases to require a taxpayer to produce his records or to concede the Government's allegations offended the Fourth and Fifth Amendments. Justice Bradley, for the Court, found that the measure unduly intruded

The *Griswold* case involved a law forbidding the use of contraceptives. We held that law as applied to married people unconstitutional:

> "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Id.*, 486.

The District Court in *Doe* held that *Griswold* and related cases "establish a constitutional right to privacy broad enough to encompass the right of a woman to terminate an unwanted pregnancy in its early stages, by obtaining an abortion." 319 F. Supp., at 1054.

The Supreme Court of California expressed the same view in *People* v. *Belous*,[3] 71 Cal. 2d 954, 963.

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into the "sanctity of a man's home and the privacies of life." *Id.*, 630. Prior to *Boyd*, in *Kilbourn* v. *Thompson*, 103 U. S. 168, 195, Mr. Justice Miller held for the Court that neither House of Congress "possesses the general power of making inquiry into the private affairs of the citizen." Of *Kilbourn* Mr. Justice Field later said, "This case will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee." *In re Pacific Ry. Comm'n*, 32 F. 231, 253 (cited with approval in *Sinclair* v. *United States*, 279 U. S. 263, 293). Mr. Justice Harlan, also speaking for the Court, in *Interstate Commerce Comm'n* v. *Brimson*, 154 U. S. 447, 478, thought the same was true of administrative inquiries, saying the Constitution did not permit a "general power of making inquiry into the private affairs of the citizen." In a similar vein were *Harriman* v. *Interstate Commerce Comm'n*, 211 U. S. 407; *United States* v. *Louisville & Nashville R. R.*, 236 U. S. 318, 335; and *Federal Trade Comm'n* v. *American Tobacco Co.*, 264 U. S. 298.

[3] The California abortion statute, held unconstitutional in the *Belous* case made it a crime to perform or help perform an abortion "unless the same is necessary to preserve [the mother's] life." 71 Cal. 2d, at 959.

The Ninth Amendment obviously does not create federally enforceable rights. It merely says, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." But a catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of "the Blessings of Liberty" mentioned in the preamble to the Constitution. Many of them in my view come within the meaning of the term "liberty" as used in the Fourteenth Amendment.

First is the autonomous control over the development and expression on one's intellect, interests, tastes, and personality.

These are rights protected by the First Amendment and in my view they are absolute, permitting of no exceptions. See *Terminiello* v. *Chicago*, 337 U. S. 77; *Roth* v. *United States*, 354 U. S. 476, 508 (dissent); *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 697 (concurring); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 293 (Black, J., concurring in which I joined). The Free Exercise Clause of the First Amendment is one facet of this constitutional right. The right to remain silent as respects one's own beliefs, *Watkins* v. *United States*, 354 U. S. 178, 196–199, is protected by the First and the Fifth. The First Amendment grants the privacy of first-class mail, *United States* v. *Van Leeuwen*, 397 U. S. 249, 253. All of these aspects of the right of privacy are "rights retained by the people" in the meaning of the Ninth Amendment.

Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.

These rights, unlike those protected by the First Amendment, are subject to some control by the police power. Thus the Fourth Amendment speaks only of "unreasonable searches and seizures" and of "probable cause." These rights are "fundamental" and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a "compelling state interest" must be shown in support of the limitation. *E. g., Kramer* v. *Union Free School Dist.*, 395 U. S. 621 (1969); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *NAACP* v. *Alabama ex rel. Patterson*.

The liberty to marry a person of one's own choosing, *Loving* v. *Virginia*, 388 U. S. 1; the right of procreation, *Skinner* v. *Oklahoma*, 316 U. S. 535; the liberty to direct the education of one's children, *Pierce* v. *Society of Sisters*, 268 U. S. 510, and the privacy of the marital relation, *Griswold* v. *Connecticut*, *supra*, **are in this category.**[4]

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[4] My Brother STEWART, writing in the present cases, says that our decision in *Griswold* reintroduced substantive due process that had been rejected in ***Ferguson*** v. ***Skrupa***, 372 U. S. 726. ***Skrupa*** involved legislation governing a business enterprise; and the Court in that case, as had Mr. Justice Holmes on earlier occasions, rejected the idea that "liberty" within the meaning of the Due Process Clause of the Fourteenth Amendment was a vessel to be filled with one's personal choices of values, whether drawn from the *laissez faire* school, from the socialistic school, or from the technocrats. *Griswold* involved legislation touching on the marital relation and involving the conviction of a licensed physician for giving married people information concerning contraception. There is nothing specific in the Bill of Rights that covers that item. Nor is there anything in the Bill of Rights that in terms protects the right of association or the privacy in one's association. Yet we found those rights in the periphery of the First Amendment. *NAACP* v. *Alabama*, 357 U. S. 449, 462. Other peripheral rights are the right to educate one's children as one chooses, *Pierce* v. *Society of Sisters*, 268 U. S. 510, and the right to study the German language. *Meyer* v. *Nebraska*, 262 U. S. 390. These decisions, with all respect, have nothing to do with substantive due process. One may think they

Only last Term in *Eisenstadt* v. *Baird*, 405 U. S. 438, another contraceptive case, we expanded the concept of *Griswold* by saying:

> "It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

This right of privacy was called by Mr. Justice Brandeis the right "to be let alone." *Olmstead* v. *United States*, 277 U. S. 438, 478. That right includes the privilege of an individual to plan his own affairs, for, "outside of areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." *Kent* v. *Dulles*, 357 U. S. 116, 126.

Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.

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are not peripheral rights to other rights that are expressed in the Bill of Rights. But that is not enough to bring into play the protection of substantive due process.

There are of course those who have believed that the reach of due process in the Fourteenth Amendment included all of the Bill of Rights but went further. Such was the view of Mr. Justice Murphy and Mr. Justice Rutledge. See *Adamson* v. *California*, 332 U. S. 46, 123, 124 (dissenting). Perhaps they were right; but it is a bridge that neither I nor those who joined the Court opinion in *Griswold* crossed.

These rights, though fundamental, are likewise subject to regulation on a showing of "compelling state interest." We stated in *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 164, that walking, strolling, and wandering "are historically part of the amenities of life as we have known them." As stated in *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29:

> "There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will."

In *Union Pac. Ry. Co.* v. *Botsford*, 141 U. S. 250, 252, the Court said,

> "The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow."

In *Terry* v. *Ohio*, 392 U. S. 1, 8–9, the Court in speaking of the Fourth Amendment stated

> "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the Governor closeted in his study to dispose of his secret affairs."

Katz v. *United States*, 389 U. S. 347, 350, emphasizes that the Fourth Amendment

> "protects individual privacy against certain kinds of governmental intrusion."

In *Meyer* v. *Nebraska*, 262 U. S. 390, 399, the Court said:

> "Without doubt, it [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowl-

edge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

The Georgia statute is at war with the clear message of these cases—that a woman is free to make the basic decision whether to bear an unwanted child. Elaborate argument is hardly necessary to demonstrate that child birth may deprive a woman of her preferred life stye and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing childcare; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.

Such a holding is, however, only the beginning of the problem. The State has interests to protect. Vaccinations to prevent epidemics are one example, as *Jacobson* holds. The Court held that compulsory sterilization of imbeciles afflicted with hereditary forms of insanity or imbecility is another. *Buck* v. *Bell*, 274 U. S. 200. Abortion affects another. While childbirth endangers the lives of some women, voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society. The woman's health is part of that concern; as is the life of the fetus after quickening. These concerns justify the State in treating the procedure as a medical one.

One difficulty is that this statute as construed and applied apparently does not give full sweep to the "psychological as well as physical well-being" of women patients which saved the concept "health" from being void for vagueness in *United States* v. *Vuitch, supra,* at 72. But apart from that, Georgia's enactment has a constitutional infirmity because, as stated by the District Court, it "limits the number of reasons for which an abortion may be sought." I agree with the holding of the District Court, "This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy." 319 F. Supp., at 1056.

The vicissitudes of life produce pregnancies which may be unwanted, or which may impair "health" in the broad *Vuitch* sense of the term, or which may imperil the life of the mother, or which in the full setting of the case may create such suffering, dislocations, misery, or tragedy as to make an early abortion the only civilized step to take. These hardships may be properly embraced in the "health" factor of the mother as appraised by a person of insight. Or they may be part of a broader medical judgment based on what is "appropriate" in a given case, though perhaps not "necessary" in a strict sense.

The "liberty" of the mother, though rooted as it is in the Constitution, may be qualified by the State for the reasons we have stated. But where fundamental personal rights and liberties are involved, the corrective legislation must be "narrowly drawn to prevent the supposed evil," *Cantwell* v. *Connecticut,* 310 U. S. 296, 307, and not be dealt with in an "unlimited and indiscriminate" manner. *Shelton* v. *Tucker,* 364 U. S. 479, 490. And see *Talley* v. *California,* 362 U. S. 60. Unless regulatory measures are so confined and are addressed to the specific areas of compelling legislative concern, the police power would become the great leveller of constitutional rights and liberties.

There is no doubt that the State may require abortions to be performed by qualified medical personnel. The legitimate objective of preserving the mother's health clearly supports such laws. Their impact upon the woman's privacy is minimal. But the Georgia statute outlaws virtually all such operations—even in the earliest stages of pregnancy. In light of modern medican evidence suggesting that an early abortion is safer healthwise than childbirth itself,[5] it cannot be seriously urged that so comprehensive a ban is aimed at protecting the woman's health. Rather, this expansive proscription of all abortions along the temporal spectrum can rest only on a public goal of preserving both embryonic and fetal life.

The present statute has struck the balance between the woman and the State's interests wholly in favor of the latter. I am not prepared to hold that a State may equate, as Georgia has done, all phases of maturation preceding birth. We held in *Griswold* that the States may not preclude spouses from attempting to avoid the joinder of sperm and egg. If this is true, it is difficult to perceive any overriding public necessity which might attach precisely at the moment of conception. As Mr. Justice Clark has said:[6]

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[5] Many studies show that it is safer for a woman to have a medically induced abortion than to bear a child. In the first 11 months of operation of the New York abortion law, the mortality rate associated with such operations was six per 100,000 operations. Abortion Mortality, 20 Morbidity and Mortality 208, 209 (1971) (U. S. Department of Health, Education, and Welfare, Public Health Service). On the other hand, the maternal mortality rate associated with childbirths other than abortions was 18 per 100,000 live births. Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969). See also C. Tietze & H. Lehfeldt, Legal Abortion in Eastern Europe 175 J. A. M. A. 1149, 1152 (1961); V. Kolblova, Legal Abortion in Czechoslovakia, 196 J. A. M. A. 371 (1966); Mehland, Combating Illegal Abortion in the Socialist Countries of Europe, 13 World Med. J. 84 (1966).

> "To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm meets egg, life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs. No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus.[7] This would not be the case if the fetus constituted human life."

In summary, the enactment is overbroad. It is not closely correlated to the aim of preserving pre-natal life. In fact, it permits its destruction in several cases, including pregnancies resulting from sex acts in which unmarried females are below the statutory age of consent. At the same time, however, the measure broadly proscribes aborting other pregnancies which may cause severe mental disorders. Additionally, the statute is overbroad because it equates the value of embryonic life immediately after conception with the worth of life immediately before birth.

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[6] Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loy. U. (L. A.) L. Rev. 1, 10 (1969).

[7] In *Keeler* v. *Superior Court*, 2 Cal. 3d 619, 470 P. 2d 617, the California Supreme Court held in 1970 that the California murder statute did not cover the killing of an unborn fetus, even though the fetus be "viable" and that it was beyond judicial power to extend the statute to the killing of an unborn. It held that the child must be "born alive before a charge of homicide can be sustained." 2 Cal. 3d, at 639.

III

Under the Georgia Act the mother's physician is not the sole judge as to whether the abortion should be performed. Two other licensed physicians must concur in his judgment.[8] Moreover, the abortion must be performed in a licensed hospital;[9] and the abortion must be approved in advance by a committee of the medical staff of that hospital.[10]

Physicians, who speak to us in *Doe* through an *amicus* brief, complain of the Georgia Act's interference with their practice of their profession.

The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relation.

It is one thing for a patient to agree that her physician may consult with another physician about her case. It is quite a different matter for the State compulsorily to impose on that physician-patient relationship another layer or, as in this case, still a third layer of physicians. The right of privacy—the right to care for one's health and person and to seek out a physician of one's own choice protected by the Fourteenth Amendment—becomes only a matter of theory not a reailty, when a multiple physician approval system is mandated by the State.

The State licenses a physician. If he is derelict or faithless, the procedures available to punish him or to deprive him of his license are well known. He is entitled to procedural due process before professional disciplinary sanctions may be imposed. See *In re Ruffalo*, 390 U. S. 544. Crucial here, however, is state-imposed control over the medical decision whether pregnancy should be interrupted. The good-faith decision of the patient's chosen physician is overridden and the final decision passed on to others in whose selection the patient has no part. This is a total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails.

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[8] See § 26-1202 (b)(3).

[9] See § 26-1202 (b)(4).

[10] Section 26-1202 (b)(5).

The right to seek advice on one's health and the right to place his reliance on the physician of his choice are basic to Fourteenth Amendment values. We deal with fundamental rights and liberties, which, as already noted, can be contained or controlled only by discretely drawn legislation that preserves the "liberty" and regulates only those phases of the problem of compelling legislative concern. The imposition by the State of group controls over the physician-patient relation is not made on any medical procedure apart from abortion, no matter how dangerous the medical step may be. The oversight imposed on the physician and patient in abortion cases denies them their "liberty," *viz.*, their right of privacy, without any compelling, discernable state interest.

Georgia has constitutional warrant in treating abortion as a medical problem. To protect the woman's right of privacy, however, the control must be through the physician of her choice and the standards set for his performance.

The protection of the fetus when it has acquired life is a legitimate concern of the State. Georgia's law makes no rational, discernible decision on that score.[11] For under the Act the developmental stage of the fetus is irrelevant when pregnancy is the result of rape or when the fetus will very likely be born with a permanent defect or when a continuation of the pregnancy will endanger the life of the mother or permanently injure her health. When life is present is a question we do not try to resolve. While basically a question for medical experts, as stated by Mr. Justice Clark,[12] it is, of course, caught up in matters of religion and morality.

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[11] See Rochat, Tyler, and Schoenbucher, An Epidemiological Analysis of Abortion in Georgia, 61 Am. J. of Public Health 541 (1971).

In short, I agree with the Court that endangering the life of the woman or seriously and permanently injuring her health are standards too narrow for the right of privacy that are at stake.

I also agree that the superstructure of medical supervision which Georgia has erected violates the patient's right of privacy inherent in her choice of her own physician.

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[12] Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loy. U. (L. A.) L. Rev. 1, 10 (1969).

SUPREME COURT OF THE UNITED STATES

No. 70-18

Jane Roe et al., Appellants,
v.
Henry Wade.

On Appeal from the United States District Court for the Northern District of Texas.

[January 22, 1973]

MR. JUSTICE STEWART, concurring.

In 1963, this Court, in ***Ferguson*** v. ***Skrupa***, 372 U. S. 726, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in *Skrupa* put it: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.*, at 730.[1]

Barely two years later, in *Griswold* v. *Connecticut*, 381 U. S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution.[2] So it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment.[3] As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.

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[1] Only Mr. Justice Harlan failed to join the Court's opinion, 372 U. S., at 733.

[2] There is no constitutional right of privacy, as such. "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents* v. *Roth*, 408 U. S. 564, 572. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238–239; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535; *Meyer* v. *Nebraska*, 262 U. S. 390, 399–400. Cf. *Shapiro* v. *Thompson*, 394 U. S. 618, 629–630; *United States* v. *Guest*, 383 U. S. 745, 757–758; *Carrington* v. *Rash*, 380 U. S. 89, 96; *Aptheker* v. *Secretary of State*, 378 U. S. 500, 505; *Kent* v. *Dulles*, 357 U. S. 116, 127; *Bolling* v. *Sharpe*, 347 U. S. 497, 499–500; *Truax* v. *Raich*, 239 U. S. 33, 41.

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the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." *Katz* v. *United States*, 389 U. S. 347, 350–351 (footnotes omitted).

[3] This was also clear to Mr. Justice Black, 381 U. S., at 507 (dissenting opinion); to Mr. Justice Harlan, 381 U. S., at 499 (opinion concurring in the judgment); and to MR. JUSTICE WHITE, 381 U. S., at 502 (opinion concurring in the judgment). See also Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in *Poe* v. *Ullman*, 367 U. S. 497, 522.

As Mr. Justice Harlan once wrote: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U. S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Mutual Ins. Co.* v. *Tidewater Transfer Co., Inc.*, 337 U. S. 582, 646 (dissenting opinion).

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Loving* v. *Virginia*, 388 U. S. 1, 12; *Griswold* v. *Connecticut*, *supra; Pierce* v. *Society of Sisters*, *supra; Meyer* v. *Nebraska*, *supra*. See also *Prince* v. *Massachusetts*, 321 U. S. 158, 166; *Skinner* v. *Oklahoma*, 316 U. S. 535, 541. As recently as last Term, in *Eisenstadt* v. *Baird*, 405 U. S. 438, 453, we recognized "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. "Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), or the right to teach a foreign language protected in *Meyer* v. *Nebraska,* 262 U. S. 390 (1923)." *Abele* v. *Markle,* — F. Supp. —, — (Conn. 1972).

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

It is evident that the Texas abortion statute infringes that right directly. Indeed, it is difficult to imagine a more complete abridgment of a constitutional freedom than that worked by the inflexible criminal statute now in force in Texas. The question then becomes whether the state interests advanced to justify this abridgment can survive the "particularly careful scrutiny" that the Fourteenth Amendment here requires.

The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment of personal liberty worked by the existing Texas law. Accordingly, I join the Court's opinion holding that that law is invalid under the Due Process Clause of the Fourteenth Amendment.

SUPREME COURT OF THE UNITED STATES

Nos. 70-18 and 70-40

Jane Roe et al., Appellants, 70-18 v. Henry Wade.	On Appeal from the United States District Court for the Northern District of Texas.
Mary Doe et al., Appellants, 70-40 v. Arthur K. Bolton, as Attorney General of the State of Georgia, et al.	On Appeal from the United States District Court for the Northern District of Georgia.

[January 22, 1973]

Mr. Justice White, with whom Mr. Justice Rehnquist joins, dissenting.

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are nevertheless unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc. The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.

The Court for the most part sustains this position: During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother.

With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against a spectrum of possible impacts on the mother on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court.

The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life which she carries. Whether or not I might agree with that marshalling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

It is my view, therefore, that the Texas statute is not constitutionally infirm because it denies abortions to those who seek to serve only their convenience rather than to protect their life or health. Nor is this plaintiff, who claims no threat to her mental or physical health, entitled to assert the possible rights of those women whose pregnancy assertedly implicates their health. This, together with *United States* v. *Vuitch,* 402 U. S. 62 (1971), dictates reversal of the judgment of the District Court.

Likewise, because Georgia may constitutionally forbid abortions to putative mothers who, like the plaintiff in this case, do not fall within the reach of § 26-1202 (a) of its criminal code, I have no occasion, and the District Court had none, to consider the constitutionality of the procedural requirements of the Georgia statute as applied to those pregnancies posing substantial hazards to either life or health. I would reverse the judgment of the District Court in the Georgia case.

SUPREME COURT OF THE UNITED STATES

No. 70-18

Jane Roe et al., Appellants, *v.* Henry Wade.	On Appeal from the United States District Court for the Northern District of Texas.

[January 22, 1973]

MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While its opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it which invalidate the Texas statute in question, and therefore dissent.

I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her law suit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. *Moose Lodge* v. *Irvis*, 407 U. S. 163 (1972); *Sierra Club* v. *Morton*, 405 U. S. 727 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her *last* trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abortion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may impose virtually no restrictions on medical abortions performed during the *first* trimester of pregnancy. In deciding such a hypothetical lawsuit the Court departs from the longstanding admonition that it should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York and Philadelphia Steamship Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). See also *Ashwander* v. *TVA*, 297 U. S. 288, 345 (1936) (Brandeis, concurring).

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas by the statute here challenged bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" which the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution which the Court has referred to as embodying a right to privacy. *Katz* v. *United States*, 389 U. S. 347 (1967).

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, but only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 491 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit on legislative power to enact laws such as this, albeit a broad one. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson, supra*. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors which the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. See *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 179 (1972) (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner* v. *New York*, 198 U. S. 45 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break the term of pregnancy into three distinct terms and to outline the permissible retrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States, reflecting after all the majority sentiment in those States, have had restrictions on abortions for at least a century seems to me as strong an indication there is that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellants would have us believe.

To reach its result the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut legislature. Conn. Stat. Tit. 22, §§ 14, 16 (1821). By the time of the adoption of the Fourteenth Amendment in 1868 there were at least 36 laws enacted by state or territorial legislatures limiting abortion.[1] While many States have amended or updated their laws. 21 of the laws on the books in 1868 remain

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[1] States having enacted abortion laws prior to the adoption of the Fourteenth Amendment in 1868:

1. Alabama—Ala. Acts, c. 6, § 2 (1840–1841).
2. Arizona—Howell Code, c. 10, § 45 (1865).
3. Arkansas—Ark. Rev. Stat., c. 44, div. III, Art. II, § 6 (1838).
4. California—Cal. Sess. Stats., c. 99, § 45, at 233 (1849–1850).
5. Colorado (Terr.)—Colo. Gen. Laws of Terr. of Colo., 1st Sess., § 42, at 296–297 (1861).
6. Connecticut—Conn. Stat. Tit. 22, §§ 14, 16, at 152, 153 (1821). By 1868 this statute had been replaced by another abortion law. Conn. Pub. Acts, c. LXXI, §§ 1, 2, at 65 (1860).
7. Florida—Fla. Acts 1st Sess., c. 1637, III, § 10, § 11, VIII, § 9, § 10, § 11, as amended now in Fla. Stat. Ann. §§ 782.09, 782.10, 797.01, 797.02, 782.16 (1944).
8. Georgia—Ga. Pen. Code §§ 56, 57, 58, 67, 68, 69 (1833).
9. Kingdom of Hawaii—Hawaii Pen. Code §§ 1, 2, 3 (1850).
10. Idaho (Terr.)—Idaho (Terr.) Laws §§ 33, 34, 42, at 435 (1863).
11. Illinois—Ill. Rev. Code §§ 40, 41, 46, at 130, 131 (1827). By 1868 this statute had been replaced by a subsequent enactment. Ill. Pub. Laws §§ 1, 2, 3, at 89 (1867).
12. Indiana—Ind. Rev. Stat. §§ 1, 3, at 224 (1838). By 1868 this statute had been superseded by a subsequent enactment. Ind. Laws c. LXXXI, § 2 (1859).
13. Iowa (Terr.)—Iowa (Terr.) Stat. 1st Legis., 1st Sess., § 18, at 145 (1838). By 1868 this statute had been superseded by a subsequent enactment. Iowa (Terr.) Rev. Stat. §§ 10, 13 (1843).
14. Kansas (Terr.)—Kan. (Terr.) Stat. c. 48, §§ 9, 10, 39 (1855). By 1868 this statute had been superseded by a subsequent enactment. Kan. Gen. Laws c. 28, §§ 9, 10 (1859).
15. Louisiana—La. Rev. Stat. § 24, at 138 (1856).
16. Maine—Me. Rev. Stat. c. 160, §§ 11, 12, 13, 14 (1840).
17. Maryland—Md. Laws c. 179, § 2, at 318 (1868).
18. Massachusetts—Mass. Acts & Resolves c. 27 (1845).
19. Michigan—Mich. Rev. Stat. c. 153, §§ 32, 33, 34, at 662 (1846).
20. Minn. (Terr.)—Minn. (Terr.) Rev. Stat. c 100, §§ 10, 11, at 493 (1851).

[*Footnote 1 continued on p. 6*]

in effect today.[2] Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and "has remained substantially unchanged to the present time." *Ante*, at —.

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21. Mississippi—Miss. Code §§ 8, 9, at 958 (1848).

22. Missouri—Mo. Rev. Stat. Art. II, §§ 9, 10, 36, at 168 (1835).

23. Montana (Terr.)—Mont. (Terr.) Laws § 41, at 184 (1864).

24. Nevada (Terr.)—Nev. (Terr.) Laws c. 28, § 42, at 63 (1861).

25. New Hampshire—N. H. Laws c. 743, § 1, at 708 (1848).

26. New Jersey—N. J. Laws, at 266 (1849).

27. New York—N. Y. Rev. Stat. pt. IV, c. I, Tit. II, §§ 8, 9, at 550 (1828). By 1868 this statute had been superseded by subsequent enactments. N. Y. Laws c. 260, §§ 1, 2, 3, 4, 5, 6, at 285 (1845); N. Y. Laws c. 22, § 1, at 19 (1846).

28. Ohio—Ohio Gen. Stat. §§ 111 (1), 112 (2), at 252 (1841).

29. Oregon—Ore. Gen. Laws, Crim. Code, c. 43, § 509, at 528 (1845–1864).

30. Pennsylvania—Pa. Laws No. 374, §§ 87, 88, 89 (1860).

31. Texas—Tex. Gen. Stat. Dig. c. VII, Arts. 531–536, at 524 (Oldham & White 1859).

32. Vermont—Vt. Acts No. 33, § 1 (1846). By 1868 this statute had been amended by a subsequent enactment. Vt. Acts No. 57, §§ 1, 3 (1867).

33. Virginia—Va. Acts Tit. II, c. 3, § 9, at 96 (1848).

34. Washington (Terr.)—Wash. (Terr.) Stats. c. II, §§ 37, 38, at 81 (1854).

35. West Virginia—Va. Acts. Tit. II, c. 3, § 9, at 96 (1848).

36. Wisconsin—Wis. Rev. Stat. c. 133, §§ 10, 11 (1849). By 1868 this statute had been superseded by a subsequent enactment. Wis. Rev. Stat. c. 164, §§ 10, 11; c. 169, §§ 58, 59 (1858).

[2] Abortion laws in effect in 1868 and still applicable as of August 1970:

1. Arizona (1865).
2. Connecticut (1860).
3. Florida (1868).
4. Idaho (1863).
5. Indiana (1838).
6. Iowa (1843).
7. Maine (1840).
8. Massachusetts (1845).
9. Michigan (1846).

[*Footnote 2 continued on p. 7*]

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

III

Even if one were to agree that the case which the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down *in toto,* even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is instead declared unconstitutional as applied to the fact situation before the Court. *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Street* v. *New York,* 394 U. S. 576 (1969).

For all of the foregoing reasons, I respectfully dissent.

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10. Minnesota (1851).
11. Missouri (1835).
12. Montana (1864).
13. Nevada (1861).
14. New Hampshire (1848).
15. New Jersey (1849).
16. Ohio (1841).
17. Pennsylvania (1860).
18. Texas (1859).
19. Vermont (1867).
20. West Virginia (1848).
21. Wisconsin (1858).

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DOE ET AL. *v.* BOLTON, ATTORNEY GENERAL OF GEORGIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 70-40. Argued December 13, 1971—Reargued October 11, 1972—Decided January 22, 1973

Georgia law proscribes an abortion except as performed by a duly licensed Georgia physician when necessary in "his best clinical judgment" because continued pregnancy would endanger a pregnant woman's life or injure her health; the fetus would likely be born with serious defects; or the pregnancy resulted from rape. § 26-1202 (a) of Ga. Criminal Code. In addition to a requirement that the patient be a Georgia resident and certain other requirements, the statutory scheme poses three procedural conditions in § 26-1202 (b): (1) that the abortion be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals (JCAH); (2) that the procedure be approved by the hospital staff abortion committee; and (3) that the performing physician's judgment be confirmed by independent examinations of the patient by two other licensed physicians. Appellant Doe, an indigent married Georgia citizen, who was denied an abortion after eight weeks of pregnancy for failure to meet any of the § 26-1202 (a) conditions, sought declaratory and injunctive relief, contending that the Georgia laws were unconstitutional. Others joining in the complaint included Georgia-licensed physicians (who claimed that the Georgia statutes "chilled and deterred" their practices), registered nurses, clergymen, and social workers. Though holding that all the plaintiffs had standing, the District Court ruled that only Doe presented a justiciable controversy. In Doe's case the court gave declaratory, but not injunctive, relief, invalidating as an infringement of privacy and personal liberty the limitation to the three situations specified in § 26-1202 (a) and certain other provisions but holding that the State's interest in health protection and the existence of a "*potential* of independent human existence" justified regulation through § 26–1202 (b) of the "manner of performance as well as the quality of the final decision to abort." The appellants, claiming entitlement to broader relief, directly appealed to this Court. *Held:*

1. Doe's case presents a live, justiciable controversy and she has standing to sue, *Roe* v. *Wade, ante,* p. —, as do the physician-appellants (who, unlike the physician in *Wade,* were not charged with abortion violations), and it is therefore unnecessary to resolve the issue of the other appellants' standing. Pp. 7–9.

2. A woman's constitutional right to an abortion is not absolute. *Roe* v. *Wade, supra.* P. 9.

3. The requirement that a physician's decision to perform an abortion must rest upon "his best clinical judgment" of its necessity is not unconstitutionally vague, since that judgment may be made in the light of *all* the attendant circumstances. *United States* v. *Vuitch,* 402 U. S. 62, 71–72. Pp. 10–12.

4. The three procedural conditions in § 26–1202 (b) violate the Fourteenth Amendment. Pp. 12–19.

(a) The JCAH accreditation requirement is invalid, since the State has not shown that only hospitals (let alone those with JCAH accreditation) meet its interest in fully protecting the patient; and a hospital requirement failing to exclude the first trimester of pregnancy would be invalid on that ground alone, see *Roe* v. *Wade, supra.* Pp. 12–15.

(b) The interposition of a hospital committee on abortion, a procedure not applicable as a matter of state criminal law to other surgical situations, is unduly restrictive of the patient's rights, which are already safeguarded by her personal physician. Pp. 15–17.

(c) Required acquiescence by two co-practitioners also has no rational connection with a patient's needs and unduly infringes on her physician's right to practice. Pp. 17–19.

5. The Georgia residence requirement violates the Privileges and Immunities Clause by denying protection to persons who enter Georgia for medical services there. Pp. 19–20.

6. Appellants' equal protection argument centering on the three procedural conditions in § 26–1202 (b), invalidated on other grounds, is without merit. P. 20.

7. No ruling is made on the question of injunctive relief. Cf. *Roe* v. *Wade, supra.* P. 20.

319 F. Supp. 1048, modified and affirmed.

Syllabus

Blackmun, J., delivered the opinion of the Court, in which Burger, C. J., and Douglas, Brennan, Stewart, Marshall, and Powell, JJ., joined. Burger, C. J., and Douglas, J., filed concurring opinions. White, J., filed a dissenting opinion, in which Rehnquist, J., joined. Rehnquist, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70-40

Mary Doe et al., Appellants, *v.* Arthur K. Bolton, as Attorney General of the State of Georgia, et al.	On Appeal from the United States District Court for the Northern District of Georgia.

[January 22, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this appeal the criminal abortion statutes recently enacted in Georgia are challenged on constitutional grounds. The statutes are §§ 26-1201 through 26-1203 of the State's Criminal Code, formulated by Georgia Laws, 1968 Session, 1249, 1277-1280. In *Roe* v. *Wade, ante* —, we today have struck down, as constitutionally defective, the Texas criminal abortion statutes that are representative of provisions long in effect in a majority of our States. The Georgia legislation, however, is different and merits separate consideration.

I

The statutes in question are reproduced as Appendix A, *post* —.[1] As the appellants acknowledge,[2] the 1968 statutes are patterned upon the American Law Institute's Model Penal Code, § 230.3 (Proposed Official Draft, 1962), reproduced as Appendix B, *post* —. The ALI proposal has served as the model for recent legislation in approximately one-fourth of our States.[3] The new

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[1] The portions italicized in Appendix A are those held unconstitutional by the District Court.

[2] Appellants' Brief 25 n. 5; Tr. of Oral Arg. 9.

[3] See *Roe* v. *Wade, ante* — n. 37.

Georgia provisions replaced statutory law that had been in effect for more than 90 years. Georgia Laws 1876, No. 130, § 2, at 113.[4] The predecessor statute paralleled the Texas legislation considered in *Roe* v. *Wade, ante,* and made all abortions criminal except those necessary "to preserve the life" of the pregnant woman. The new statutes have not been tested on constitutional grounds in the Georgia state courts.

Section 26-1201, with a referenced exception, makes abortion a crime, and § 26-1203 provides that a person convicted of that crime shall be punished by imprisonment for not less than one nor more than 10 years. Section 26–1202 (a) states the exception and removes from § 1201's definition of criminal abortion, and thus makes noncriminal, an abortion "performed by a physician duly licensed" in Georgia when, "based upon his best clinical judgment . . . an abortion is necessary because

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[4] The active provisions of the 1876 statute were:

"Section I. *Be it enacted, etc.,* That from and after the passage of this Act, the wilful killing of an unborn child, so far developed as to be ordinarily called 'quick,' by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be guilty of a felony, and punishable by death or imprisonment for life, as the jury trying the case may recommend.

"Sec. II. *Be it further enacted,* That every person who shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder.

"Sec. III. *Be it further enacted,* That any person who shall wilfully administer to any pregnant woman any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished as prescribed in section 4310 of the Revised Code of Georgia."

It should be noted that the second section, in contrast to the first, makes no specific reference to quickening. The section was construed, however, to possess this line of demarcation. *Taylor* v. *State,* 105 Ga. 846, 33 S. E. 190 (1899).

> "(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health, or
>
> "(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect, or
>
> "(3) The pregnancy resulted from forcible or statutory rape."[5]

Section 26–1202 also requires, by numbered subdivisions of its subsection (b), that, for an abortion to be authorized or performed as a noncriminal procedure, additional conditions must be fulfilled. These are (1) and (2) residence of the woman in Georgia; (3) reduction to writing of the performing physician's medical judgment that an abortion is justified for one or more of the reasons specified by § 26–1202 (a), with written concurrence in that judgment by at least two other Georgia-licensed physicians, based upon their separate personal medical examinations of the woman; (4) performance of the abortion in a hospital licensed by the State Board of Health and also accredited by the Joint Commission on Accreditation of Hospitals; (5) advance approval by an abortion committee of not less than three members of the hospital's staff; (6) certifications in a rape situation; and (7), (8), and (9) maintenance and confidentiality of records. There is a provision (subsection (c)) for judicial determination of the legality of a proposed abortion on petition of the judicial circuit law officer or of a close relative, as therein defined, of the unborn child, and for expeditious hearing of that petition. There is also a provision (subsection (e)) giving a hospital the right not to admit an abortion patient and giving any physician and any hospital employee or staff member the right, on moral or religious grounds, not to participate in the procedure.

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[5] In contrast with the ALI model, the Georgia statute makes no specific reference to pregnancy resulting from incest. We were assured by the State at reargument that this was because the statute's reference to "rape" was intended to include incest. Tr. of Rearg. 32.

II

On April 16, 1970, Mary Doe,[6] 23 other individuals (nine described as Georgia-licensed physicians, seven as nurses registered in the State, five as clergymen, and two as social workers), and two nonprofit Georgia corporations that advocate abortion reform, instituted this federal action in the Northern District of Georgia against the State's attorney general, the district attorney of Fulton County, and the chief of police of the city of Atlanta. The plaintiffs sought a declaratory judgment that the Georgia abortion statutes were unconstitutional in their entirety. They also sought injunctive relief restraining the defendants and their successors from enforcing the statutes.

Mary Doe alleged:

> "(1) She was a 22-year-old Georgia citizen, married, and nine weeks pregnant. She had three living children. The two older ones had been placed in a foster home because of Doe's poverty and inability to care for them. The youngest, born July 19, 1969, had been placed for adoption. Her husband had recently abandoned her and she was forced to live with her indigent parents and their eight children. She and her husband, however, had become recon-

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[6] Appellants by their complaint, Appendix 7, allege that the name is a pseudonym.

ciled. He was a construction worker employed only sporadically. She had been a mental patient at the State Hospital. She had been advised that an abortion could be performed on her with less danger to her health than if she gave birth to the child she was carrying. She would be unable to care for or support the new child.

"(2) On March 25, 1970, she applied to the Abortion Committee of Grady Memorial Hospital, Atlanta, for a therapeutic abortion under § 26-1202. Her application was denied 16 days later, on April 10, when she was eight weeks pregnant, on the ground that her situation was not one described in § 26-1202 (a).[7]

"(3) Because her application was denied, she was forced either to relinquish 'her right to decide when and how many children she will bear' or to seek an abortion that was illegal under the Georgia statutes. This invaded her rights of privacy and liberty in matters related to family, marriage, and sex, and deprived her of the right to choose whether to bear children. This was a violation of rights guaranteed her by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. The statutes also denied her equal protection and procedural due process and, because they were unconstitutionally vague, deterred hospitals and doctors from performing abortions. She sued 'on her own behalf and on behalf of all others similarly situated.'"

The other plaintiffs alleged that the Georgia statutes "chilled and deterred" them from practicing their respective professions and deprived them of rights guaranteed by the First, Fourth, and Fourteenth Amendments. These plaintiffs also purported to sue on their own behalf and on behalf of others similarly situated.

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[7] In answers to interrogatories Doe stated that her application for an abortion was approved at Georgia Baptist Hospital on May 5, 1970, but that she was not approved as a charity patient there and had no money to pay for an abortion. Appendix 64.

A three-judge district court was convened. An offer of proof as to Doe's identity was made, but the court deemed it unnecessary to receive that proof. The case was then tried on the pleadings and interrogatories.

The District Court, *per curiam,* 319 F. Supp. 1048 (ND Ga. 1970), held that all the plaintiffs had standing but that only Doe presented a justiciable controversy. On the merits, the court concluded that the limitation in the Georgia statute of the "number of reasons for which an abortion may be sought," *id.,* at 1056, improperly restricted Doe's rights of privacy articulated in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), and of "personal liberty," both of which it thought "broad enough to include the decision to abort a pregnancy," *id.,* at 1055. As a consequence, the court held invalid those portions of §§ 26–1202 (a) and (b)(3) limiting legal abortions to the three situations specified; § 26–1202 (b)(6) relating to certifications in a rape situation; and § 26–1202 (c) authorizing a court test. Declaratory relief was granted accordingly. The court, however, held that Georgia's interest in protection of health, and the existence of a "*potential* of independent human existence" (emphasis in original), *id.,* at 1055, justified state regulation of "the manner of performance as well as the quality of the final decision to abort," *id.,* at 1056, and it refused to strike down the other provisions of the statutes. It denied the request for an injunction, *id.,* at 1057.

Claiming that they were entitled to an injunction and to broader relief, the plaintiffs took a direct appeal pursuant to 28 U. S. C. § 1253. We postponed decision on jurisdiction to the hearing on the merits. 402 U. S. 941 (1971). The defendants also purported to appeal, pursuant to § 1253, but their appeal was dismissed for want of jurisdiction. 402 U. S. 936 (1971). We are advised by the defendant-appellees, Brief 42, that an alternative appeal on their part is pending in the United States Court of Appeals for the Fifth Circuit. The extent, therefore, to which the District Court decision was adverse to the defendants, that is, the extent to which portions of the Georgia statutes were held to be unconstitutional, technically is not now before us.[8] *Swarb* v. *Lennox,* 405 U. S. 191, 201 (1972).

III

Our decision in *Roe* v. *Wade, ante* —, establishes (1) that, despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state on April 16, 1970; (2) that the constitutional issue is substantial; (3) that the interim termination of Doe's and all other Georgia pregnancies in existence in 1970 has not rendered the case moot; and (4) that Doe presents a justiciable controversy and has standing to maintain the action.

Inasmuch as Doe and her class are recognized, the question whether the other appellants—physicians, nurses, clergymen, social workers, and corporations—present a justiciable controversy and have standing is perhaps a matter of no great consequence. We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. *Crossen* v. *Breckenridge,* 446 F. 2d 833, 839–840 (CA6 1971); *Poe* v. *Menghini,* 339 F. Supp. 986, 990–991 (Kans. 1972).

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[8] What we decide today obviously has implications for the issues raised in the defendants' appeal pending in the Fifth Circuit.

In holding that the physicians, while theoretically possessed of standing, did not present a justiciable controversy, the District Court seems to have relied primarily on *Poe* v. *Ullman,* 367 U. S. 497 (1961). There a sharply divided Court dismissed an appeal from a state court on the ground that it presented no real controversy justifying the adjudication of a constitutional issue. But the challenged Connecticut statute, deemed to prohibit the giving of medical advice on the use of contraceptives, had been enacted in 1879, and, apparently with a single exception, no one had ever been prosecuted under it. Georgia's statute, in contrast, is recent and not moribund. Furthermore, it is the successor to another Georgia abortion statute under which, we are told,[9] physicians were prosecuted. The present case, therefore, is closer to *Epperson* v. *Arkansas,* 393 U. S. 97 (1968), where the Court recognized the right of a school teacher, though not yet charged criminally, to challenge her State's anti-evolution statute. See also *Griswold* v. *Connecticut,* 381 U. S., at 481.

The parallel claims of the nurse, clergy, social worker, and corporation-appellants are another step removed and as to them, the Georgia statutes operate less directly. Not being licensed physicians, the nurses and the others are in no position to render medical advice. They would be reached by the abortion statutes only in their capacity as accessories or as counselor-conspirators. We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and nothing is gained or lost by the presence or absence of the nurses, the clergymen, the social workers, and the corporations. See *Roe* v. *Wade, ante,* at ——.

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[9] Tr. of Oral Arg. 21–22.

IV

The appellants attack on several grounds those portions of the Georgia abortion statutes that remain after the District Court decision: undue restriction of a right to personal and marital privacy; vagueness; deprivation of substantive and procedural due process; improper restriction to Georgia residents; and denial of equal protection.

A. *Roe* v. *Wade, ante,* sets forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand. What is said there is applicable here and need not be repeated.

B. The appellants go on to argue, however, that the present Georgia statutes must be viewed historically, that is, from the fact that prior to the 1968 Act an abortion in Georgia was not criminal if performed to "preserve the life" of the mother. It is suggested that the present statute, as well, has this emphasis on the mother's rights, not on those of the fetus. Appellants contend that it is thus clear that Georgia has given little, and certainly not first, consideration to the unborn child. Yet it is the unborn child's rights that Georgia asserts in justification of the statute. Appellants assert that this justification cannot be advanced at this late date.

Appellants then argue that the statutes do not adequately protect the woman's right. This is so because it would be physically and emotionally damaging to Doe to bring a child into her poor "fatherless" [10] family, and because advances in medicine and medical techniques have made it safer for a woman to have a medically induced abortion than for her to bear a child. Thus, "a statute which requires a woman to carry an unwanted pregnancy to term infringes not only on a fundamental right of privacy but on the right to life itself." Brief 27.

The appellants recognize that a century ago medical knowledge was not so advanced as it is today, that the techniques of antisepsis were not known, and that any abortion procedure was dangerous for the woman. To restrict the legality of the abortion to the situation where it was deemed necessary, in medical judgment, for the preservation of the woman's life was only a natural conclusion in the exercise of the legislative judgment of that time. A State is not to be reproached, however, for a past judgmental determination made in the light of then-existing medical knowledge. It is perhaps unfair to argue, as the appellants do, that because the early focus was on the preservation of the woman's life, the State's present professed interest in the protection of embryonic and fetal life is to be downgraded. That argument denies the State the right to readjust its views and emphases in the light of the advanced knowledge and techniques of the day.

C. Appellants argue that § 26–1202 (a) of the Georgia statute, as it has been left by the District Court's decision, is unconstitutionally vague. This argument centers in the proposition that, with the District Court's having stricken the statutorily specified reasons, it still remains a crime for a physician to perform an abortion except when, as § 26–1202 (a) reads, it is "based upon his best clinical judgment that an abortion is necessary." The appellants contend that the word "necessary" does not warn the physician of what conduct is proscribed; that the statute is wholly without objective standards and is subject to diverse interpretation; and that doctors will choose to err on the side of caution and will be arbitrary.

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[10] Appellants' Brief 25.

The net result of the District Court's decision is that the abortion determination, so far as the physician is concerned, is made in the exercise of his professional, that is, his "best clinical" judgment in the light of *all* the attendant circumstances. He is not now restricted to the three situations originally specified. Instead, he may range farther afield wherever his medical judgment, properly and professionally exercised, so dictates and directs him.

The vagueness argument is set at rest by the decision in *United States* v. *Vuitch,* 402 U. S. 62, 71–72 (1971), where the issue was raised with respect to a District of Columbia statute making abortions criminal "unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." That statute has been construed to bear upon psychological as well as physical well-being. This being so, the Court concluded that the term "health" presented no problem of vagueness. "Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." 402 U. S., at 72. This conclusion is equally applicable here. Whether, in the words of the Georgia statute, "an abortion is necessary," is a professional judgment that the Georgia physician will be called upon to make routinely.

We agree with the District Court, 319 F. Supp., at 1058, that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

D. The appellants next argue that the District Court should have declared unconstitutional three procedural demands of the Georgia statute: (1) that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals:[11] (2) that the procedure be approved by the hospital staff abortion committee; and (3) that the performing physician's judgment be confirmed by the independent examinations of the patient by two other licensed physicians. The appellants attack these provisions not only on the ground that they unduly restrict the woman's right of privacy, but also on procedural due process and equal protection grounds. The physician-appellants also argue that, by subjecting a doctor's individual medical judgment to committee approval and to confirming consultations, the statute impermissibly restricts the physician's right to practice his profession and deprives him of due process.

1. *JCAH Accreditation.* The Joint Commission on Accreditation of Hospitals is an organization without governmental sponsorship or overtones. No question whatever is raised concerning the integrity of the organization or the high purpose of the accreditation process.[12]

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[11] We were advised at reargument, Tr. of Rearg. 10, that only 54 of Georgia's 159 counties have a JCAH accredited hospital.

[12] Since its founding, JCAH has pursued the "elusive goal" of defining the "optimal setting" for "quality of service in hospitals." JCAH, Accreditation Manual for Hospitals, Foreward (Dec. 1970). The Manual's Introduction states the organization's purpose to establish standards and conduct accreditation programs that will afford quality medical care "to give patients the optimal benefits that medical science has to offer." This ambitious and admirable goal is illustrated by JCAH's decision in 1966 "to raise and strengthen the

That process, however, has to do with hospital standards generally and has no present particularized concern with abortion as a medical or surgical procedure.[13] In Georgia there is no restriction of the performance of nonabortion surgery in a hospital not yet accredited by the JCAH so long as other requirements imposed by the State, such as licensing of the hospital and of the operating surgeon, are met. See Georgia Code §§ 88-1901 (a) and 88-1905 (1971) and 84-907 (Supp. 1971). Furthermore, accreditation by the Commission is not granted until a hospital has been in operation at least one year. The Model Penal Code, § 230.3, Appendix B hereto, contains no requirement for JCAH accreditation. And the Uniform Abortion Act (Final Draft, August 1971),[14] approved by the American Bar Association in February 1972, contains no JCAH accredited hospital specification.[15] Some courts have held that a JCAH accredita-

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standards from their present level of minimum essential to the level of optimum achievable . . . ." Some of these "optimum achievable" standards required are: disclosure of hospital ownership and control; a dietetic service and written dietetic policies; a written disaster plan for mass emergencies; a nuclear medical services program; facilities for hematology, chemistry, microbiology, clinical microscopy, and sero-immunology; a professional library and document delivery service; a radiology program; a social services plan administered by a qualified social worker; and a special care unit.

[13] "The Joint Commission neither advocates nor opposes any particular position with respect to elective abortions." Letter dated July 9, 1971, from John L. Brewer, M. D., Commissioner, JCAH, to the Rockefeller Foundation. Brief for *amici*, American College of Obstetricians and Gynecologists, et al., p. A-3.

[14] See *Roe* v. *Wade, ante* —, n. 40.

[15] Some state statutes do not have the JCAH accreditation requirement. Alaska Stat. § 11.15.060 (1970); Hawaii Rev. Stat. § 453.16 (Supp. 1971); N. Y. Penal Code § 125.05.3 (McKinney Supp. 1972-1973). Washington has the requirement but couples it with the alternative of "a medical facility approved . . . by the state board of health." Wash. Rev. Code § 9.02.070 (Supp. 1972). Florida's new statute has a similar provision. Law of Apr. 13, 1972, c.

tion requirement is an overbroad infringement of fundamental rights because it does not relate to the particular medical problems and dangers of the abortion operation. *Poe* v. *Menghini,* 339 F. Supp. 986, 993–994 (Kan. 1972); *People* v. *Barksdale,* 96 Cal. Rptr. 265, 273–274 (Cal. App. 1971).

We hold that the JCAH accreditation requirement does not withstand constitutional scrutiny in the present context. It is a requirement that simply is not "based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey* v. *Doud,* 354 U. S. 457, 465 (1957).

This is not to say that Georgia may not or should not, from and after the end of the first trimester, adopt standards for licensing all facilities where abortions may be performed so long as those standards are legitimately related to the objective the State seeks to accomplish. The appellants contend that such a relationship would be lacking even in a lesser requirement that an abortion be performed in a licensed hospital, as opposed to a facility, such as a clinic, that may be required by the State to possess all the staffing and services necessary to perform an abortion safely (including those adequate to handle serious complications or other emergency, or arrangements with a nearby hospital to provide such services). Appellants and various *amici* have presented us with a mass of data purporting to demonstrate that some facilities other than hospitals are entirely adequate to perform abortions if they possess these qualifications.

72–196, § 1 (2). Others contain the specification. Ark. Stat. Ann. §§ 41–303 to 41–310 (Supp. 1971); Cal. Health and Safety Code §§ 25950–25955.5 (West Supp. 1972); Colo. Rev. Stats. Ann. §§ 40–2–50 to 40–2–53 (Perm. Cum. Supp. 1967); Kan. Stat. Ann. § 21–3047 (Supp. 1971); Md. Ann. Code Art. 43, §§ 137–139 (Repl. 1971). Cf. Del. Code Ann. §§ 1790–1793 (Supp. 1970) specifying "a nationally recognized medical or hospital accreditation authority," § 1790 (a).

The State, on the other hand, has not presented persuasive data to show that only hospitals meet its acknowledged interest in insuring the quality of the operation and the full protection of the patient. We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests. We hold that the hospital requirement of the Georgia law, because it fails to exclude the first trimester of pregnancy, see *Roe* v. *Wade, ante,* p. —, is also invalid. In so holding we naturally express no opinion on the medical judgment involved in any particular case, that is, whether the patient's situation is such that an abortion should be performed in a hospital rather than in some other facility.

2. *Committee Approval.* The second aspect of the appellants' procedural attack relates to the hospital abortion committee and to the pregnant woman's asserted lack of access to that committee. Relying primarily on *Goldberg* v. *Kelly,* 397 U. S. 254 (1970), concerning the termination of welfare benefits, and *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971), concerning the posting of an alcoholic's name, Doe first argues that she was denied due process because she could not make a presentation to the committee. It is not clear from the record, however, whether Doe's own consulting physician was or was not a member of the committee or did or did not present her case, or, indeed, whether she herself was or was not there. We see nothing in the Georgia statute that explicitly denies access to the committee by or on behalf of the woman. If the access point alone were involved, we would not be persuaded to strike down the committee provision on the unsupported assumption that access is not provided.

Appellants attack the discretion the statute leaves to the committee. The most concrete argument they advance is their suggestion that it is still a badge of infamy "in many minds" to bear an illegitimate child, and that the Georgia system enables the committee members' personal views as to extramarital sex relations, and punishment therefor, to govern their decisions. This approach obviously is one founded on suspicion and one that discloses a lack of confidence in the integrity of physicians. To say that physicians will be guided in their hospital committee decisions by their predilections on extramarital sex unduly narrows the issue to pregnancy outside marriage. (Doe's own situation did not involve extramarital sex and its product.) The appellants' suggestion is necessarily somewhat degrading to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions, and the concern of his female patients. He, perhaps more than anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty, so-called "error," and needs. The good physician—despite the presence of rascals in the medical profession, as in all others, we trust that most physicians are "good" —will have a sympathy and an understanding for the pregnant patient that probably is not exceeded by those who participate in other areas of professional counseling.

It is perhaps worth noting that the abortion committee has a function of its own. It is a committee of the hospital and it is composed of members of the institution's medical staff. The membership usually is a changing one. In this way its work burden is shared and is more readily accepted. The committee's function is protective. It enables the hospital appropriately to be advised that its posture and activities are in accord with legal requirements. It is to be remembered that the hospital is an entity and that it, too, has legal rights and legal obligations.

Saying all this, however, does not settle the issue of the constitutional propriety of the committee requirement. Viewing the Georgia statute as a whole, we see no constitutionally justifiable pertinence in the structure for the advance approval by the abortion committee. With regard to the protection of potential life, the medical judgment is already completed prior to the committee stage, and review by a committee once removed from diagnosis is basically redundant. We are not cited to any other surgical procedure made subject to committee approval as a matter of state criminal law. The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview. And the hospital itself is otherwise fully protected. Under § 26–1202 (e) the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital. Section 26–1202 (e) affords adequate protection to the hospital and little more is provided by the committee prescribed by § 26–1202 (b)(5).

We conclude that the interposition of the hospital abortion committee is unduly restrictive of the patient's rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician. To ask more serves neither the hospital nor the State.

3. *Two-Doctor Concurrence.* The third aspects of the appellants' attack centers on the "time and availability of adequate medical facilities and personnel." It is said that the system imposes substantial and irrational roadblocks and "is patently unsuited" to prompt determination of the abortion decision. Time, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.

The appellants purport to show by a local study[16] of Grady Memorial Hospital (serving indigent residents in Fulton and DeKalb Counties) that the "mechanics of the system itself forced . . . discontinuation of the abortion process" because the median time for the workup was 15 days. The same study shows, however, that 27% of the candidates for abortion were already 13 or more weeks pregnant at the time of application, that is, they were at the end of or beyond the first trimester when they made their applications. It is too much to say, as appellants do, that these particular persons "were victims of [a] system over which they [had] no control." If higher risk was incurred because of abortions in the second rather than the first trimester, much of that risk was due to delay in application, and not to the alleged cumbersomeness of the system. We note, in passing, that appellant Doe had no delay problem herself; the decision in her case was made well within the first trimester.

It should be manifest that our rejection of the accredited hospital requirement and, more important, of the abortion committee's advance approval eliminates the major grounds of the attack based on the system's delay and the lack of facilities. There remains, however, the required confirmation by two Georgia-licensed physicians in addition to the recommendation of the pregnant woman's own consultant (making under the statute, a total of six physicians involved, including the three on the hospital's abortion committee). We conclude that this provision, too, must fall.

The statute's emphasis, as has been repetitively noted, is on the attending physician's "best clinical judgment that an abortion is necessary." That should be sufficient. The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge. Again, no other voluntary medical or surgical procedure for which Georgia requires confirmation by two other physicians has been cited to us. If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure or deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice. The attending physician will know when a consultation is advisable—the doubtful situation, the need for assurance when the medical decision is a delicate one, and the like. Physicians have followed this routine historically and know its usefulness and benefit for all concerned. It is still true today that "[r]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he [the physician] possesses the requisite qualifications." *Dent* v. *West Virginia,* 129 U. S. 114, 122–123 (1889). See *United States* v. *Vuitch,* 402 U. S., at 71.

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[16] L. Baker & M. Freeman, Abortion Surveillance at Grady Memorial Hospital Center for Disease Control (June and July 1971) (U. S. Dept. of HEW, PHS).

E. The appellants attack the residency requirement of the Georgia law, §§ 26–1202 (b)(1) and (b)(2), as violative of the right to travel stressed in *Shapiro* v. *Thompson,* 394 U. S. 618, 629–631 (1969), and other cases. A requirement of this kind, of course, could be deemed to have some relationship to the availability of post-procedure medical care for the aborted patient.

Nevertheless, we do not uphold the constitutionality of the residence requirement. It is not based on any policy of preserving state-supported facilities for Georgia residents, for the bar also applies to private hospitals and to privately retained physicians. There is no intimation, either, that Georgia facilities are utilized to capacity in caring for Georgia residents. Just as the Privileges and Immunities Clause, Const. Art. IV, § 2, protects persons who enter other States to ply their trade, *Ward* v. *Maryland,* 79 U. S. (12 Wall.) 418, 430 (1870); *Blake* v. *McClung,* 172 U. S. 239, 248–256 (1898), so must it protect persons who enter Georgia seeking the medical services that are available there. See *Toomer* v. *Witsell,* 334 U. S. 385, 396–397 (1948). A contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve.

F. The last argument on this phase of the case is one that often is made, namely, that the Georgia system is violative of equal protection because it discriminates against the poor. The appellants do not urge that abortions should be performed by persons other than licensed physicians, so we have no argument that because the wealthy can better afford physicians, the poor should have nonphysicians made available to them. The appellants acknowleged that the procedures are "nondiscriminatory in . . . express terms" but they suggest that they have produced invidious discriminations. The District Court rejected this approach out of hand. 319 F. Supp., at 1056. It rests primarily on the accreditation and approval and confirmation requirements, discussed above, and on the assertion that most of Georgia's counties have no accredited hospital. We have set aside the accreditation, approval, and confirmation requirements, however, and with that, the discrimination argument collapses in all significant aspects.

V

The appellants complain, finally, of the District Court's denial of injunctive relief. A like claim was made in *Roe* v. *Wade, ante.* We declined decision there insofar as injunctive relief was concerned, and we decline it here. We assume that Georgia's prosecutorial authorities will give full recognition to the judgment of this Court.

In summary, we hold that the JCAH accredited hospital provision and the requirements as to approval by the hospital abortion committee, as to confirmation by two independent physicians, and as to residence in Georgia are all violative of the Fourteenth Amendment. Specifically, the following portions of § 26–1202 (b), remaining after the District Court's judgment, are invalid:

(1) Subsections (1) and (2).

(2) That portion of Subsection (3) following the words "such physician's judgment is reduced to writing."

(3) Subsections (4) and (5).

The judgment of the District Court is modified accordingly and, as so modified, is affirmed. Costs are allowed to the appellants.

APPENDIX A

Criminal Code of Georgia

(The italicized portions are those held unconstitutional by the District Court)

CHAPTER 26-12. ABORTION.

26-1201. Criminal Abortion. Except as otherwise provided in section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

26-1202. Exception. (a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary *because:*

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met;

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84–9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment, necessary *because of one or more of the reasons enumerated above.*

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped, the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made by any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b) (5). A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26–1203. Punishment. A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years.

APPENDIX B

American Law Institute
MODEL PENAL CODE

Section 230.3. Abortion.

(1) *Unjustified Abortion.* A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) *Justifiable Abortion.* A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) *Physicians' Certificates; Presumption from Non-Compliance.* No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any

of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

(4) *Self-Abortion.* A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) *Pretended Abortion.* A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) *Distribution of Abortifacients.* A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or

(d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the general public.

(7) *Section Inapplicable to Prevention of Pregnancy.* Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

SUPREME COURT OF THE UNITED STATES

No. 70-40

Mary Doe et al., Appellants,
v.
Arthur K. Bolton, as Attorney General of the State of Georgia, et al.

On Appeal from the United States District Court for the Northern District of Georgia.

[January 22, 1973]

MR. JUSTICE REHNQUIST, dissenting.

The holding in *Roe* v. *Wade, ante,* that state abortion laws can withstand constitutional scrutiny only if the States can demonstrate a compelling state interest apparently compels the Court's close scrutiny of the various provisions in Georgia's abortion statute. Since, as indicated by my dissent in *Wade,* I view the compelling state interest standard as an inappropriate measure of the constitutionality of state abortion laws, I respectfully dissent from the majority's holding.

PART 4.--ARTICLES PREPARED BY THE CONGRESSIONAL RESEARCH SERVICE

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

January 21, 1982

TO : Senate Judiciary Subcommittee on the Constitution
Attention: Steve Markman

FROM : American Law Division

SUBJECT : Application of Constitutional Amendment to the District of Columbia

This is in response to your inquiry with respect to the application of the constitutional amendment proposed by S.J. Res. 110, 97th Congress, to the District of Columbia. As introduced, the resolution would add to the Constitution the following language.

> A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: Provided, That a law of a State which is more restrictive than a law of Congress shall govern.

No doubt can be plausibly asserted that the proposed amendment would fully apply in the District of Columbia. The District is "within the geographical limits of the United States" to the same degree as the territories were which the Supreme Court was speaking of in United States v. Kagama, 118 U.S. 375, 379 (1886). "The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these."[1/] With regard to the District, the Constitution expressly vests the

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[1/] Note that this assertion and mode of analysis were followed by the Supreme Court as recently as January 13, 1982, in Community Communications Co. v. City of Boulder, 80-1350, slip. op. at 10-13.

power "[t]o exercise exclusive Legislation in all Cases whatsoever" over this area created by the cession of territory from the States as contemplated in Article I, §8, cl. 17.

Rights conferred by the Constitution were "secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property ...." Callan v. Wilson, 127 U.S. 540, 550 (1888). See also Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899); United States v. Moreland, 258 U.S. 433 (1922). Constitutional decisions made in the context of the United States at large or with regard to the powers or the limits on the States have been held to be fully applicable to, and to mean the same thing in, the District of Columbia. E.g., Adkins v. Children's Hospital, 261 U.S. 525 (1923), overruled on the substantive decision in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Bolling v. Sharpe, 347 U.S. 497 (1954).

Thus, the abortion decisions, interpreting the due process clause of the Fourteenth Amendment, Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 113 (1973), by parity of reasoning apply in the District of Columbia through interpretation of the due process clause of the Fifth Amendment. As the first sentence of the proposed amendment alters this interpretation, it alters it for the District of Columbia.

Power to legislate with respect to abortions is conferred by the second sentence of the proposal on "Congress and the several States." While the

District, which is now largely self-governing, District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198, 87 Stat. 774, is nowhere mentioned in the proposal, the District derives its entire authority to govern by delegation from Congress. As the Court noted in Metropolitan Railroad Co. v. District of Columbia, 132 U.S. 1, 9 (1889), while the District "is a separate political community," its "sovereign power ... is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress."

And that sovereign power may be exercised over the District by either Congress or a governing body in the District in receipt of delegated powers from Congress. "[T]here is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, subject of course to constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted." District of Columbia v. John R. Thompson Co., 346 U.S. 100, 109 (1953). See also Barnes v. District of Columbia, 91 U.S. 540 (1876); Palmore v. United States, 411 U.S. 389 (1973); Swain v. Pressley, 430 U.S. 372 (1977). A constitutional amendment, therefore, which confers powers upon Congress empowers it to act for the District through legislation enacted by Congress or to delegate that power to a local governing body within the District. Assuming that the language of the District's "home rule" statute encompasses abortion as a subject of delegated power ratification of the proposed amendment would enlarge the District governing body's authority in that respect.[2]

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[2] The only question that might be raised would be whether the conferral of "concurrent" power on Congress and the States would for this purpose suspend the "exclusive" jurisdiction vested in Congress by Article I, §8, cl. 17. The (continued)

It is thus submitted that the proposed amendment would in the event of ratification apply as fully in the District as elsewhere in the United States.

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(continued) purpose of the word "exclusive" in that clause was to eliminate any possibility that Congress' legislative power would have to be shared with the ceding States. *District of Columbia* v. *John R. Thompson Co.*, *supra*, 109. But concurrency only operates where two governing entities have geographical supervision over the same area: a State's laws cannot except in rare circumstances operate extraterritorially, see, e.g., Article IV, §1, and no basis exists for Maryland or Virginia to assume to have any legislative authority within the territory of the District of Columbia.

ABORTION: JUDICIAL AND LEGISLATIVE CONTROL

ISSUE BRIEF NUMBER IB74019

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ISSUE DEFINITION

In 1973 the U.S. Supreme Court held that the Constitution protects a woman's decision whether or not to terminate her pregnancy, *Roe v. Wade*, 410 U.S. 113, and that a State may not unduly burden the exercise of that fundamental right by regulations that prohibit or substantially limit access to the means of effectuating that decision, *Doe v. Bolton*, 410 U.S. 179. But rather than settling the issue, the Court's rulings have kindled heated debate and precipitated a variety of governmental actions at the national, State and local levels designed either to nullify the rulings or hinder their effectuation. These governmental regulations have, in turn, spawned further litigation in which resulting judicial refinements in the law have been no more successful in dampening the controversy. Thus the 97th Congress promises to again be a forum for proposed legislation and constitutional amendments aimed at limiting or prohibiting the practice of abortion and 1981 will see court dockets, including that of the Supreme Court, filled with an ample share of challenges to State and local actions.

BACKGROUND AND POLICY ANALYSIS

The background section of this issue brief is organized under five categories, as follows:

I. JUDICIAL HISTORY
   A. Development and Status of the Law Prior to 1973
   B. The Supreme Court's 1973 Abortion Rulings

II. U.S. SUPREME COURT DECISIONS SUBSEQUENT TO "ROE" AND "DOE"
   A. Informed Consent, Spousal Consent, Parental Consent, and Reporting Requirements
   B. Parental Notice
   C. Advertising of Abortion Services
   D. Abortions by Non-Physicians
   E. Abortions in Public and Private Hospitals
   F. The Definition of Viability

III. THE PUBLIC FUNDING OF ABORTIONS
   A. The 1977 Trilogy -- Restrictions on Public Funding of Nontherapeutic or Elective Abortions
   B. The Public Funding of Therapeutic of Medically Necessary Abortions -- The Supreme Court's Decisions in *McRae* and *Zbaraz*

IV. UNRESOLVED ISSUES RELATING TO ABORTION

V. LEGISLATION
   A. Constitutional Amendments
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   D. Limitation on Federal Court Jurisdiction
   E. Early Developments in the 97th Congress
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I. JUDICIAL HISTORY

A. Development and Status of the Law Prior to 1973

The moral and legal issues raised by the practice of abortion has tested the philosophers, theologians, and statesmen of every age since the dawn of civilization. The Stoics' belief that abortion should be allowed up to the moment of birth was vigorously opposed by the Pythogoreans who believed that the soul was infused into the body at conception and that to abort a fetus would be to commit murder. Early Roman law was silent as to abortion; and abortion and infanticide was common in Rome, especially among the uppper classes. Opposition by scholars and the growing influence of the Christian religion brought about the first prohibition of abortion during the reign of Severus (193-211 A.D.). These laws made abortion a high criminal offense and subjected a woman who violated the provisions to banishment. During the European Middle Ages major church theologians differentiated between an _embryo informatus_ (prior to endowment of a soul) and an _embryo formatus_ (after endowment with a soul). The distinction was used to assess punishments for abortion, fines being levied if abortion occurred before animation but death ordered if it was aborted at any time after.

The English common law adopted the doctrine of "quickening" i.e., the first movement of the fetus in the mother's womb, to pinpoint the time when abortion could incur sanctions. Generally, at common law, abortion performed before quickening was not an indictable offense. There is dispute whether abortion of a quick fetus was a felony. The predominant view is that abortion of a quick fetus was, at most, a minor offense. In the United States, the law in all but a few States until the mid-19th Century adopted the pre-existing English common law. Thus, no indictment would occur for aborting a fetus for a consenting female prior to quickening. However, there could be an indictment afterward. Also, as was the case under the common law, a woman herself was not indictable for submitting to an abortion, or for aborting herself, before quickening.

By the time of the Civil War, however, an influential antiabortion movement began to affect legislation by inducing States to add to or revise their statutes in order to prohibit abortion at all stages of gestation. By 1910 every State had antiabortion laws, except Kentucky whose courts judicially declared abortions to illegal. In 1967, 49 of the States and the District of Columbia classified the crime of abortion as a felony. The concept of quickening was no longer used to determine criminal liability but was retained in some States to set punishment. Non-therapeutic abortions were essentially unlawful. The States varied in their exceptions for therapeutic abortions. Forty-two States permitted abortions only if necessary to save the life of the mother. Other States allowed abortion to save a woman from "serious and permanent bodily injury" or her "life and health." Three States allowed abortions that were not "unlawfully performed" or that were not "without lawful justification", leaving interpretation of those standards to the courts.

This, however, represented the highwater mark in restrictive abortion laws in the United States, for 1967 saw the first victory of an abortion reform movement with the passage of liberalizing legislation in Colorado. The legislation was based upon the Model Penal Code. The movement started in the early 1950s and centered its efforts on a proposed criminal abortion statute developed by the American Law Institute that would allow abortions when childbirth posed grave danger to the physical or mental health of a woman, when there was high likelihood of fetal abnormality, or when pregnancy resulted from rate or incest.

Between 1967 and the Supreme Court's 1973 decisions in *Roc* and *Doe*, approximately one-third of the States had adopted, either in whole or in part, the Model Penal Code's provisions allowing abortions in instances other than where only the mother's life was in danger. Also, by the end of 1970, four States (Alaska, Hawaii, New York, and Washington) had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements.

The first U.S. Supreme Court decision dealing with abortion was rendered in 1971. *U.S. v. Vuitch*, 402 U. S. 62. In *Vuitch*, the Court denied a vagueness challenge to the District of Columbia abortion statute. The net effect of the *Vuitch* decision was to expand the availability of abortions under the D.C. law's provision allowing abortions where "necessary for the preservation of the mother's ...health."

B. The Supreme Court's 1973 Abortion Rulings

Between 1968 and 1972 the constitutionability of restrictive abortion statutes of many States were challenged on the grounds of vagueness, violation of the fundamental right of privacy, and denial of equal protection under these laws. These challenges met with mixed success in the lower courts. However, on Jan. 22, 1973, the Supreme Court issued its rulings in *Roe v. Wade* and *Doe v. Bolton*. In those cases the Court found that Texas and Georgia statutes regulating abortion interfered to an unconstitutional extent with a woman's right to decide whether to terminate her pregnancy. The Texas statute forbade all abortions not necessary "for the purpose of saving the life of the mother." The Georgia enactment permitted abortions when continued pregnancy seriously threatened the woman's life or health, when the fetus was very likely to have severe birth defects, or when the pregnancy resulted from rape. The Georgia statute required, however, that abortions be performed only at accredited hospitals and only after approval by a hospital committee and two consulting physicians.

The Court's decisions were delivered by Mr. Justice Blackmun for himself and six other Justices. Justices White and Rehnquist dissented. The Court ruled that States may not categorically proscribe abortions by making their performance a crime, and that States may not make abortions unnecessarily difficult to obtain by prescribing elaborate procedural guidelines. The constitutional basis for the decisions rested upon the conclusion that the Fourteenth Amendment right of personal privacy embraced a woman's decision whether to carry a pregnancy to term. The Court noted that its prior decisions had "found at least the roots of ... a guarantee of personal privacy" in various amendments to the Constitution or their penumbras (i.e., protected offshoots) and characterized the right to privacy as grounded in "the Fourteenth Amendment's concept of personal liberty and restrictions upon State action." *Roe v. Wade*, 410 U. S. 113, 152, 153 (1973). Regarding the scope of that right, the Court stated that it included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'" and "bears some extension to activities related to marriage, procreation, contraception, family relationship, and child rearing and education." *Id.* at 152-153. Such a right, the Court concluded, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

With respect to protection of the right against State interference, the Court held that since the right of personal privacy is a fundamental right, only a "compelling State interest" could justify its limitation by a State. Thus while it recognized the legitimacy of the State interest in protecting maternal health and the preservation of the fetus' potential life, *Id*. at 148-150, and the existence of a rational connection between these two interests and the State's antiabortion law, the Court held these interests insufficient to justify an absolute ban on abortions. Instead, the Court emphasized the durational nature of pregnancy and held the State's interests to be sufficiently compelling to permit curtailment or prohibition of abortion only during specified stages of pregnancy. The High Court concluded that until the end of the first trimester an abortion is no more dangerous to maternal health than childbirth itself, and found that:

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in light of present medical knowledge, is at approximately the end of the first trimester. Id. at 163.

Only after the first trimester does the State's interest in protecting maternal health provide a sufficient basis to justify State regulation of abortion, and then only to protect this interest. *Id.* at 163-164.

The "compelling" point with respect to the State's interest in the potential life of the fetus "is at viability." Following viability, the State's interest permits it to regulate and even proscribe an abortion except when necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. =Id. at 163-164. The Court defined viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." *Id*. at 160. The Court summarized its holding as follows:

> (a) For the stage prior to approximately the end of the first trimester of pregnancy , the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.
>
> 410 U.S. at 164-165

In *Doe v. Bolton*, 410 U.S. 179 (1973), the Court reiterated its holding in *Roe v. Wade* that the basic decision of when an abortion is proper rests with the pregnant mother and her physician, but extended *Roe* by warning that just as States may not prevent abortion by making the performance a crime, States may not make abortions unreasonably difficult to obtain by prescribing elaborate procedural barriers. In Doe, therefore, the Court struck down State requirements that abortions be performed in licensed hospitals; that abortions be approved beforehand by a hospital committee; and that two physicians concur in the abortion decision. Id. at 196-199. The Court appeared to note, however, that this would not apply to a statute that protected the religious or moral beliefs of denominational hospitals and their employees. Id. at 197-98.

The Court in Roe also dealt with the question whether a fetus is a person under the Fourteenth Amendment and other provisions of the Constitution. The Court indicated that the Constitution never specifically defines "person," but added that in nearly all the sections where the word person appears, "...the use of the word is such that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application." 410 U.S. at 157. The Court emphasized that given the fact that in the major part of the 19th century prevailing legal abortion practices were far freer than today, the Court was persuaded "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Id. at 158.

The Court did not, however, resolve the question of when life actually begins. While noting the divergence of thinking on this issue, it, instead, articulated the legal concept of "viability," which is defined as the point at which the fetus is potentially able to live outside the womb, although the fetus may require artificial aid. Id. at 160.

The Supreme Court's decisions in Roe v. Wade and Doe v. Bolton did not address a number of important abortion-related issues which have subsequently been raised by State actions seeking to restrict the scope of the Court's rulings. These include the issues of informed consent, spousal consent, parental consent, and reporting requirements. In addition, Roe and Doe never resolved the question of what, if any, type of abortion procedures may be required or prohibited by statute. Moreover, there remained the matter of whether fetal protection statutes were constitutional. Unanswered by the 1973 cases as well was the constitutionality of three other types of statutes affecting access to abortion: (1) those proscribing the advertising regarding the availability of an abortion or abortion-related services in another State; (2) those prohibiting abortions by non-physicians; and (3) those allowing private hospitals to refuse to perform abortions. In addition, since Roe and Doe, questions have arisen with respect to the constitutionality of: (1) the experimental use of fetuses; (2) waiting period requirements; (3) termination of parental rights; (4) the right of a physician to refuse to participate in an abortion; and (5) notice requirements. Finally, the entire matter of the Government funding of abortions was not dealt with in Roe and Doe, since public funding was not possible at that time.

II. U.S. SUPREME COURT DECISIONS SUBSEQUENT TO "ROE" AND "DOE"

A. Informed Consent, Spousal Consent, Parental Consent, and Reporting Requirements

In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court held that informed consent statutes, which require a doctor to obtain the written consent of a woman after informing her of the dangers of abortion and possible alternatives, are constitutional if the requirements are related to maternal health and are not overbearing. 428 U.S. 52, 65-66. The fact that the informed consent laws must define their requirements very narrowly in order to be constitutional was later confirmed by the Supreme Court in 1979 when it summarily affirmed an Eighth Circuit Court of Appeals decision holding to that effect in *Freiman v. Ashcroft*, 584 F.2d 247, 251 (8th Cir. 1978) *aff'd mem.*, 99 S.Ct. 1416 (1979). The requirements of an informed consent statute must also be narrowly drawn so as not to unduly interfere with the physician-patient relationship, although the type of information required to be given to a woman of necessity may vary according to the trimester of her pregnancy.

In addition to informed consent, the *Danforth* decision dealt with the issue of spousal consent. The Supreme Court found that spousal consent statutes, which require a written statement by the father of the fetus affirming his consent to the abortion, are unconstitutional if the statutes allow the husband to unilaterally prohibit the abortion in the first trimester. 428 U.S. 52, 69. It should be noted that on the same day that the Supreme Court decided *Danforth*, it also summarily affirmed the lower court decision in *Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1974), *aff'd*, 428 U.S. 901 (1976), which held unsonstitutional a spousal consent law regardless of the stage of the woman's pregnancy.

With respect to parental consent statutes, the Supreme Court held in *Danforth* that those statutes that allow a parent or guardian to absolutely prohibit an abortion to be performed on a minor child were unconstitutional. Subsequently, in *Belotti v. Baird*, 443. U.S. 622 (1979), the Court ruled that while a State may require a minor to obtain parental consent, the State must also provide an alternative procedure to procure authorization if parental consent is denied or the minor does not want to seek it. From the reasoning used in *Belotti*, it appears that the Court felt a minor is entitled to some proceeding which allows her to prove her ability to make an informed decision independent of her parents, or that even if she is incapable of making the decision, at least showing that the abortion would be in her best interests.

The Court in *Danforth* also ruled that reporting requirements in statutes requiring doctors and health facilities to provide information to States regarding each abortion performed, are constitutional. The Court specified, however, that these reporting requirements relate to maternal health, remain confidential, and may not be overbearing. 428 U.S. 52, 80-81.

Another aspect in the *Danforth* case related to the constitutionality of abortion procedure statutes that prohibit the use of saline amniocentesis to obtain an abortion. The Court held such statutes unconstitutional because it believed that a procedure as widely accepted in medical circles as that requiring the use of saline amniocentesis could not be prohibited. Moreover, the State statute in question was held to be inconsistent in its proscription, since it allowed other more dangerous procedures while prohibiting some that were safer, more effective, and more widely accepted by the medical profession.

Finally, another significant ruling made by the Court in *Danforth* was that fetal protection statutes were generally overbroad and unconstitutional if they pertained to pre-viable fetuses. Such statutes require a doctor performing an abortion to use available means and medical skills to save the life of the fetus. In a subsequent decision, *Colautti v. Franklin*, 439 U.S. 379 (1979), the Supreme Court held that such fetal protection statutes could only apply to viable fetuses and that the statute must be precise in setting forth the standard for determining viability. In addition, the Court in Colautti stressed that in order to meet the constitutional test of sufficient certainty, fetal protection laws had to define whether a doctor's paramount duty was to the patient or whether the physician had to balance the possible danger to the patient against the increased odds of fetal survival. 439 U.S. S 379, 397-401.

B. Parental Notice

The Supreme Court did attempt to provide further clarification of the parental consent and notification issues in its decision in Bellotti v. Baird, 443 U.S. 622 (1979). There the Court held unconstitutional a Massachusetts statute that required parental consultation or notification in every instance without affording the pregnant minor an opportunity to receive an independent judicial determination that she was mature enough to consent or that the abortion would be in her best interests. The Court also found unconstitutional a statutory provision that permitted judicial authorization for an abortion to be withheld from a minor who is found by the court to be mature and fully competent to make the decision whether or not to terminate her pregnancy independently. However, in an effort to provide some future guidelines, the court, in dicta, suggested that if a State wished to use parental notification, it must afford the minor the option of proceeding directly to court, without parental notification, where she must show that she is a mature minor or that, if she is found not able to make the decision independently, the desired abortion is in her best interests. Four of the eight justices objected to this suggestion on the ground that it was an advisory opinion.

On Mar. 23, 1981, the Court upheld a Utah State law making it a crime for doctors to perform an abortion on an unemancipated, dependent minor without notifying her parents. In H.L. v. Matheson, 79-5903, a 6-to-3 decision, the Court examined the narrow question of the facial constitutionality of a statute requiring a physician to give notice to parents, "if possible," prior to performing an abortion on their minor daughter, (a) when the girl is living with and dependent upon her parents, (b) when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her relationship with her parents. The Supreme Court cited the interest in preserving family integrity and protecting adolescents in allowing States to require that parents be informed that their daughter is seeking an abortion, and emphasized that the statute in question did not give a veto power over the minor's abortion decision. Chief Justice Burger reasoned that the Utah law, "as applied to immature and dependent minors ... serves the important considerations of family integrity and protecting adolescents." In addition, parental notice provides "... an opportunity for parents to supply essential medical and other important information to a physician. The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particulary so when the patient is immature." The Court rejected the minor woman's contention that abortion was being singled out for special treatment in contrast to other surgical procedures, like childbirth, which do not require parental notice. The Chief Justice responded that the situations differed and "if the pregnant girl elects to carry her child to term, the medical decisions to be made entail few -- perhaps none -- of the potentially grave emotional and psychological consequences of the decision to abort." Thus, the Court found the Utah law to be constitutional, since it served important State interests, was narrowly drawn to protect only those interests, and did not in any way violate any of the guarantees of the Constitution. Still directly unanswered, however, is the question whether parental notification can be required in the case of a mature, emancipated minor. The implication of the *Bellotti* and *Matheson* rulings is that such a law would be constitutionally suspect.

C. Advertisement of Abortion Services

The Supreme Court held in *Bigelow v. Virginia*, 421 U.S. 809 (1975), that a State may not proscribe advertising regarding the availability of an abortion or abortion-related services in another State. The Court found that the statute in question was unconstitutional because the State of Virginia, where the advertisement appeared, had only a minimal interest in the health and medical practices of New York, the State in which the legal abortion services were located.

D. Abortions by Non-Physicians

In *Connecticut v. Menillo*, 429 U.S. 9 (1975), the Supreme Court ruled that State statutes similar to the Texas law challenged in *Roe* were constitutional to the extent that the statutes forbid non-physicians from performing abortions. The *Roe* decision made it clear that a State could not interfere with a woman's decision, made in consultation with and upon the advice of her doctor, to have an abortion in the first trimester of her pregnancy. The *Menillo* Court found that pre-*Roe* restrictive abortion laws were still enforceable against non-physicians. 423 U.S. 9, 11.

E. Abortions in Public and Private Hospitals

In *Poelker v. Doe*, 432 U.S. 519 (1977) (*per curiam*), the Supreme Court held that the policy of the City of St. Louis in refusing to allow the performance of nontherapeutic abortions in its public hospitals, and of staffing those hospitals with personnel opposed to the performance of abortions, did not violate the equal protection clause of the Constitution. *Poelker*, however, did not deal with the question of private hospitals and their authority to prohibit abortion services. In *Poelker*, the Court dealt with the right of a municipality to elect to provide publicly financed hospital services for childbirth without providing corresponding services for non-therapeutic abortions. The Court approved this practice.

No cases have been reported challenging State laws which allow doctors to refuse to participate in abortion procedures. This may be explained by the fact that a woman can always seek out another physician who could perform an abortion, should a doctor initially refuse because of religious or other beliefs.

To date the Supreme Court has not rendered a decision regarding the constitutionality of State statutes that allow private hospitals to refuse to participate in abortions; however, Federal district courts have ruled on this issue. See, e.g., *Jones v. Eastern Me. Med. Center*, 448 F. Supp. 1156 (D. Me. 1978), where the court upheld such a law.

F. The Definition of Viability

The Supreme Court's articulation of the concept of viability has required further elaboration, particularly with regard to the critical question of who defines at what point a fetus has reached viability. In *Roe* the Court defined viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160. Such potentiality, however, must be for "meaningful life" and this cannot encompass simply momentary survival. 410 U.S. at 163. The Court also noted that while viability is usually placed at about 28 weeks, it can occur earlier and essentially left the point flexible for anticipated advances in medical skill. Finally, *Roe* stressed the central role of the pregnant woman's doctor, emphasizing that "the abortion decision in all its aspects is inherently, and primarily, a medical decision." 410 U.S. at 160. Similar themes were stressed in =Planned Parenthood of Central Missouri v. Danforth=, 428 U.S. 52 (1976), in which a Missouri law, which defined viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life support systems", was attacked as an attempt to advance the point of viability to an earlier stage of gestation. The Court disagreed, finding the statutory definition consistent with *Roe*. It re-emphasized that viability is "a matter of medical judgment, skill, and technical ability" and that *Roe* meant to preserve the flexibility of the term. 428 U.S. at 64. Moreover, the *Danforth* Court held that "it is not the proper function of the legislature or the courts to place viability, which is esentially a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the attending physician." 428 U.S. at 64. The physician's central role in determining viability, and the lack of such definitional authority in the legislatures and courts, was most recently reaffirmed by the Court in *Colautti v. Franklin*, 439 U.S. 379 (1979).

III. THE PUBLIC FUNDING OF ABORTIONS

Two categories of public funding cases have been heard and decided by the Supreme Court: (1) those involving funding restrictions for nontherapeutic (elective) abortions and (2) those involving funding limitations for therapeutic (medically necessary) abortions.

A. The 1977 Trilogy -- Restrictions on Public Funding of Nontherapeutic or Elective Abortions

On June 20, 1977, the Supreme Court, in three related decisions, ruled on the question whether the Medicaid statute or the Constitution requires public funding of nontherapeutic (elective) abortions for indigent women or access to public facilities for the performance of such abortions. The Court held that the States have neither a statutory nor a constitutional obligation in this regard. *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); and *Poelker v. Doe*, 432 U.S. 519 (1977) (*per curiam*).

In *Beal v. Doe*, the Supreme Court dealt with the question of whether Title XIX of the Social Security Act required the funding of nontherapeutic abortion as a condition of participation in the Medicaid program established by the Act. The Court held that nothing in the language or legislative history of Title XIX requires a participating State to fund every medical procedure falling within the delineated categories of medical care. Each State is given broad discretion to determine the extent of medical assistance that is "reasonable" and "consistent with the obligations" of Title XIX. The

Court ruled that it was not inconsistent with the Act's goals to refuse to fund unnecessary medical services. The Court recognized the State's interest in encouraging normal childbirth and found no congressional intent to undercut that interest by subsidizing the costs of nontherapeutic abortions. However, the Court did indicate that Title XIX left a State free to include coverage for nontherapeutic abortions should it choose to do so.

In Maher v. Roe, the Supreme Court resolved a constitutional challenge to Connecticut's refusal to reimburse Medicaid recipients for abortion expenses except where the attending physician certifies the abortion to have been medically or psychiatrically necessary. The Court held that the Equal Protection Clause does not require a State participating in the Medicaid program to pay expenses incident to nontherapeutic abortions simply because the State has made a policy choice to pay expenses incident to childbirth. More particularly, Connecticut's policy of favoring childbirth over abortion was held not to impinge upon the fundamental right of privacy recognized in Roe v. Wade, which protects a woman from undue interference in her decision to terminate a pregnancy. According to the Court, the State's choice did not handicap an indigent woman desiring an abortion, since she could continue, as before, to look to private abortion services and private sources of funding. In essence, the Court found no absolute bar for an indigent woman seeking an abortion.

In Poelker v. Doe, the Court upheld a regulation of the municipalities of St. Louis that denied indigent pregnant women nontherapeutic abortions at public hospitals. In an unsigned per curiam opinion, the Court stated that it held "for the reasons stated in Maher, that the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth as St. Louis has done." 432 U.S. at 521.

B. The Public Funding of Therapeutic or Medically Necessary Abortions -- The Supreme Court's Decisions in McRae and Zbaraz

The 1977 Supreme Court decisions left open the question whether Federal law, such as the Hyde Amendment, or similar State laws, could validly prohibit governmental funding of therapeutic abortions.

On June 30, 1980, in a 5-4 decision, the U.S. Supreme Court ruled that the Hyde Amendment's abortion funding restrictions were constitutional. The Court's majority found that the Hyde Amendment neither violated the due process or equal protection guarantees of the Fifth Amendment nor the Establishment Clause of the First Amendment. The Court also upheld the right of a State participating in the Medicaid program to fund only those medically necessary abortions for which it received Federal reimbursement. Harris v. McRae, 100 S.Ct. 2671 (1980). In companion cases raising similar issues, the Court held that a State of Illinois statutory funding restriction comparable to the Federal Hyde Amendment also did not contravene the constitutional restrictions of the equal protection clause of the Fourteenth Amendment. Williams v. Zbaraz; Miller v. Zbaraz; U.S. v. Zbaraz, 100 S.Ct. 2694 (1980). The Court's rulings in McRae and Zbaraz mean there is no statutory or constitutional obligation on the States or the Federal Government to fund all medically necessary abortions.

IV. UNRESOLVED ISSUES RELATING TO ABORTION

Among the abortion issues not yet addressed by the Supreme Court are the constitutionality of State statutes regarding: (1) the experimental use of fetuses; (2) waiting period requirements; (3) termination of parental rights; and (4) the right to refuse to provide abortion services by physicians and/or private hospitals.

The subject of the experimental use of fetuses was challenged in *Wynn v. Scott*, 449 F.Supp. 1302 (1978), *appeal dismissed*, 439 U.S. 8 (1979). In *Wynn*, the district court upheld as constitutional a State law that prohibited live nonviable or certain dead viable fetuses from being used for experimental purposes. 449 F.Supp. at 1322. The Court further found that the provisions in the law being challenged did "not impose any burden on the woman who is deciding whether to terminate her pregnancy." *Id*. Moreover, the Court in *Wynn* ruled that the parties challenging the statute's validity failed to prove that a rational relationship did not exist between the provision in the law and the State's interest in regulating the practice of medicine.

The question of the constitutional validity of State laws restricting fetal research is likely to recur. To date, there are approximately 19 States with laws that attempt to limit fetal research. Thus, other court challenges may be anticipated.

Another issue relating to abortion that has yet to reach resolution in the Supreme Court is that involving State laws requiring women to wait between 24 and 72 hours prior to receiving their abortions. Most of the cases have held that such waiting period requirements which apply to all women were constitutional. *Wolfe v. Schroering*, 541 F. 2d 523 (6th Cir. 1976); *Wynn v. Scott*, 449 F.Supp. 1302 (N.D. Ill. 1978). One court found that a waiting period which applied only to minors was unconstitutional. *Wynn v. Carey*, 599 F. 2d 193 (7th Cir. 1979). The court reasoned that the statute in question was invalid because it was underinclusive by excluding married minors, and overinclusive by including mature, emancipated minors. More recently, the U.S. Court of Appeals for the First Circuit ordered the State of Massachusetts to suspend a requirement that women wait 24 hours after signing a mandatory consent form before an abortion can be performed, pending a lower court ruling on the merits. The court held that although the delay was "extremely brief," it constituted a "substantial State-created burden on a woman's fundamental right" to have an abortion. *Planned Parenthood v. Bellotti*, 80-1580, 1st Cir., Feb. 19, 1981.

A number of States have laws that automatically terminate parental rights if a live infant results from an attempted abortion. These laws have uniformly been held unconstitutional. *Wynn v. Carey*, 599 F. 2d 193 (7th Cir. 1979); *Wynn v. Scott*, 449 F.Supp. 1302, 1322 (N.D. Ill. 1978). These courts have generally reasoned that such statutes are invalid because the provisions threaten women with a cut-off of parental rights without according them procedural due process. There are two States, Indiana and Minnesota, that have provisions for voluntary termination of parental rights which have not been challenged to date.

A final area in dispute involves the question of the constitutional validity of State laws that allow doctors and/or private hospitals to refuse to participate in an abortion. No cases have been reported challenging State statutes allowing physicians to refuse to perform an abortion. There have been challenges to State laws allowing private hospitals to refuse to participate in abortions. Such statutes have generally withstood court challenges. In one case a Federal court invalidated the provision because it found that the private hospital in question was sufficiently intermingled with the Government to constitute State action. The presence of State action caused the court to rule that the private hospital had to admit patients for abortions. Doe v. Charleston Area Med. Ctr., Inc. 529 F. 2d 638 (4th Cir. 1975). See also, Jones v. Eastern Me. Med. Center, 448 F.Supp. 1156 (D.Me. 1978).

Public hospitals, however, do not have to allow abortions in certain circumstances. See Poelker v. Doe, 432 U.S. 519 (1977), where the Supreme Court held that the City of St. Louis had the right to refuse to provide publicly financed hospital services for nontherapeutic abortions.

V. LEGISLATION

In the 96th Congress, 73 bills were introduced containing some type of restrictive abortion provision. Thus far in the 97th Congress, 30 bills have been submitted. The proposals may be divided into four general categories:

A. Bills that seek a constitutional amendment prohibiting abortion;

B. Hyde-type amendments to appropriations bills;

C. Hyde-type amendments to substantive bills; and

D. Bills that limit Federal court jurisdiction over abortion-related issues.

An examination of the bills in each of the four categories helps clarify the different issues and methods proposed to restrict the availability of abortion. The same patterns have held true in the 97th Congress with the exception of the introduction of proposals for a "human life statute," which would overrule Roe v. Wade by legislation rather than constitutional amendment.

A. Constitutional Amendments

Since 1973, constitutional amendments have been introduced in Congress in an attempt to overrule the Court's decision in Roe v. Wade. These constitutional amendments have fallen into two areas: The "State's rights" or State option type of amendment and the so-called "right to life" or "human life amendment (HLA)" proposal. The "State's rights" amendment would result in abortion standards that would vary from State to State. Some States might prohibit abortions entirely; other could have no restrictions at all. In effect, such an amendment would restore to the States the same control over abortion rights that existed prior to the Supreme Court's decision in Roe v. Wade in 1973. This option is not as popular as it once was. No "State's rights" amendments have been introduced in the 96th and 97th Congresses.

The typical "right to life" amendment would create a new right in the unborn (personhood) which the Supreme Court has declared is not guaranteed in the Constitution at present. Presently, the Fifth and Fourteenth Amendments prohibit only the Federal and State governments from depriving anyone of life without due process of law. Some provisions of proposed "right to life" amendments would extend the prohibition to include private individuals as well. The proposed amendments utilize a variety of terms to define the time the right attaches: "conception," "moment of fertilization" or "at any stage of biological development."

Some amendments introduced allow abortion to save the life of the mother. Some provide no exceptions. The following "right to life" constitutional amendments were introduced in the 96th Congress: H.J.Res. 9, H.J.Res. 17, H.J.Res. 45, H.J.Res. 49, H.J.Res. 51, H.J.Res. 56, H.J.Res. 64, H.J.Res. 90, H.J.Res. 101, H.J.Res. 108, H.J.Res. 116, H.J.Res. 124, H.J.Res. 132, H.J.Res. 135, H.J.Res. 138, H.J.Res. 139, H.J.Res. 142, H.J.Res. 165, H.J.Res. 197, H.J.Res. 211, H.J.Res. 214, H.J.Res. 232, H.J.Res. 236, H.J.Res. 250, H.J.Res. 294, H.J.Res. 297, H.J.Res. 300, H.J.Res. 323, H.J.Res. 354, H.J.Res. 475, H.J.Res. 479, H.J.Res. 576, H.J.Res. 621, H.J.Res. 626, S.J.Res. 12, and S.J.Res. 22. None of the proposed amendments in the 96th Congress received any action.

In the 97th Congress, the following proposed constitutional amendments have been introduced: H.J.Res. 13, H.J.Res. 27, H.J.Res. 32, H.J.Res. 39, H.J.Res. 50, H.J.Res. 62, H.J.Res. 92, H.J.Res. 99, H.J.Res. 104, H.J.Res. 106, H.J.Res. 122, H.J.Res. 125, H.J.Res. 127, H.J.Res. 133, H.J.Res. 198, H.R. 392, S.J.Res. 17, S.J.Res. 18, and S.J.Res. 19.

The only hearings held prior to the 97th Congress were conducted periodically from 1974 to 1976 without any recommendation being made. In this Congress, hearings were held by the Senate Judiciary Subcommittee on Separation of Powers on Apr. 23 and 24, 1981, to address the question of when life begins. More hearings by the Subcommittee are expected in late May or early June.

B. Hyde-Type Amendments to Appropriations Bills

Congress has attached abortion restrictions to appropriations bills, the first being the Foreign Assistance Act of 1973, P.L. 93-189. However, more recently the focus of attention has been on restricting the availability of abortions under the Medicaid program. The latter series of restrictions have popularly become known as the Hyde Amendments. To date, there have been four enactments of this limitation on Federal funding of abortions under the annual Departments of Labor (DOL) and Health, Education and Welfare (HEW) appropriations bills.

The first version of the Hyde Amendment was enacted as a rider to the FY77 Labor/HEW Appropriation Act, P.L. 94-439. Section 209 of the law provided that.

> None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered in the fetus were carried to term.

During the first session of the 95th Congress, another restrictive provision was attached to the FY78 Labor/HEW Appropriations Act. This measure, P.L. 95-205, provided in part that:

> None of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health

> service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.
>
> Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

This provision thus broadened the use of appropriated funds to include medical procedures for promptly reported cases of rape and incest, long lasting physical health damage to the mother, and other matters.

The Labor/HEW abortion policy for FY79 is found in Section 210 of P.L. 95-480. This third enactment of the Hyde Amendment was essentially the same as that of FY78.

For FY80, the Labor/HEW abortion policy was changed by enactment of the fourth version of the Hyde Amendment, which excluded abortions "where severe and long lasting physical health damage would result if the pregnancy were carried to term," but retained the other provisions enacted for FY78 and FY79. See P.L. 96-123, Section 109.

The House and Senate were unable to reach agreement on final FY81 funding contained in the Labor/HHS appropriations measure. After a protracted debate, a continuing resolution was adopted that contains a Hyde Amendment which differs from the most recent restrictions in two respects. First, a rape must be reported to a law enforcement agency or public health service within 72 hours. Second, and most significant, the States were released from the obligation to fund any abortion if they so choose. Prior to this provision the courts had interpreted the Medicaid statute to require the States to fund all abortions allowed under the Hyde Amendment. See P.L. 93-536. The continuing resolution expires on June 6, 1981.

Restrictions on the Federal funding of abortion has had a significant impact on the number of abortions performed under the Medicaid statute. Prior to the enactment of the Hyde Amendment, the Office of Population Affairs, DHEW, prepared very rough estimates of Federal funds expended for abortions under the Medicaid program. The Office of Population Affairs estimated that in 1974 Medicaid financed between 220,000 and 278,000 abortions at a cost of $40-50 million. For 1976, the Office estimated that Medicaid financed abortion procedures at an annual rate of 250,000 to 300,000 at a cost of $45-55 million. According to the Medicaid data branch of the Office of Policy, Planning and Research, DHEW, from Feb. 14, 1978 through Dec. 31, 1978, 2,328 abortions were funded at a cost of $777,158 to State and Federal governments.

The Hyde Amendment process has not been limited to the annual Labor/HHS appropriations bill. During the 95th and 96th Congresses, Hyde-type abortion limitations were enacted into law as Section 863 of the Department of Defense Appropriations Act of 1979 (See P.L. 95-457, 95th Congress, 2d session (1978)) and as amendments to the District of Columbia appropriation bill for FY80. (See P.L. 96-93, 96th Congress, 1st session, (1979).)

Section 863 of the 1979 Department of Defense Appropriation Act is referred to as the Dornan Amendment. It uses language identical to that of FY78 and FY79 Labor/HEW appropriations. The Dornan Amendment restricts the use of military appropriations for abortions, and the restrictions specifically apply to military personnel and their dependents.

The abortion restriction for Federal funds provided to the District of Columbia (D.C.) stated:

> None of the Federal funds provided in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service. Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

This limitation does not appear to restrict the use of non-Federal funds at the disposal of the District of Columbia. The same funding restriction was continued in the District's FY81 appropriation. P.L. 96-530, Section 118. As yet, no restrictions have been attached to appropriations bills in the 97th Congress.

C. Hyde-Type Amendments to Substantive Bills

The abortion restrictions added to H.R. 4962 (96th Congress), the Child Health Assurance Program (CHAP), marked the first time a prohibition on Medicaid-funded abortions had been included on an authorization bill. All other Medicaid-related abortion amendments were contained in appropriations bills.

Two controversial abortion amendments were added by the House to H.R. 4962; one banning Medicaid abortions except to save the life of the mother, the other providing that States were not required to use State funds for abortions. The bill never reached the Senate floor.

Two prohibitive provisions were added to S. 210 (H.R. 2444), the bill establishing the Department of Education. The first amendment would have prohibited the Department from providing abortions to employees and their dependents at remote locations (such as overseas schools for military dependents), except to save the life of the mother. The second amendment would, in effect, have prohibited the Department from providing buildings and other facilities to universities that used mandatory student fees to pay for abortions. Both provisions were deleted in conference and the bill became P.L. 96-88.

Since 1973 several authorization bills have been adopted by Congress that directly relate to the abortion issue. The Health Services Extension Act of 1973, P.L. 93-45, contained a conscience clause, a provision that prohibits complying institutions and individuals that receive Federal funds to perform or participate in abortion or sterilization procedures from discriminating against applicants because of their beliefs on abortion. The Foreign Assistance Act of 1973, P.L. 93-189, prohibited the use of funds to pay for the performance of abortions or to coerce any person to practice abortion.

Bills introduced in the 96th Congress that contained some type of conscience clause were H.R. 3436. H.R. 3849 and S. 664 (all amending the

Health Programs Extensions Act of 1973), and P.L. 96-76 (S. 230/H.R. 3633), the Nurse Training Amendments of 1979. No conscience clause bills have been introduced in the 97th Congress.

S. 2337 (96th Congress), the Legal Services Corporation Act Amendments of 1980, prohibited the Corporation from providing legal assistance on any litigation relating to abortion, the performance of which is prohibited by law enacted by Congress (current law prohibits the Corporation from providing assistance for nontherapeutic abortions). S. 2337 passed the Senate but never received House action.

H.R. 360 and H.R. 361 of the 96th Congress permitted the parent or guardian of a minor child to inspect personal medical files of the minor except for that portion of the file that relates to family planning services (including abortion) sought and received by such minor. H.R. 1059 and H.R. 1060 have been introduced in this Congress. Neither bill has come out of committee.

In the 96th Congress, a different approach was proposed in H.R. 6028 (S. 1808), H.R. 7445, and H.R. 7955, the Family Protection Act. The bills required federally-funded abortion and venereal disease treatment centers to notify parents of unmarried minors that such minors have requested an abortion, contraceptives, or are undergoing treatment for a venereal disease. The bills have been reintroduced as H.R. 311 this Congress. H.R. 2446 of the 97th Congress would amend Title X of the Public Health Service Act to deny grants and contracts to any entity that provides abortion counseling to minors without the knowledge and consent of their parents or guardians. H.R. 2647 does not limit the restriction to Title X facilities.

The final bill in this category, H.R. 2040, would have amended title XIX (Medicaid) of the Social Security Act to prohibit Federal payments for abortion except to prevent the death of the mother.

D. Limitation on Federal Court Jurisdiction

Several bills were introduced in the 96th Congress proposing limitations on the power of Federal courts. H.R. 5440, H.R. 7307, and S. 1238 would have prohibited Federal courts (excluding the Supreme Court) from issuing injunctive relief in any case dealing with abortion. This Congress, H.R. 73, H.R. 900, S. 158 and S. 583 have been introduced. In the 96th Congress, H.R. 993 would have removed the jurisdiction of the Supreme Court and Federal district courts to prohibit the consideration of any abortion case. In the 97th Congress, H.R. 867 has been introduced.

E. Early Developments in the 97th Congress

Patterns of legislative activity established in previous Congresses are being maintained. By the end of April 1981, 19 proposed right to life constitutional amendments were introduced. Seven would provide no specific exception for procedures to save the life of the mother: H.J. Res. 13, H.J.Res. 32, H.J.Res. 50, H.J.Res. 104, H.J.Res. 106, H.R. 392, S.J.Res. 19. Eleven would make the amendment inapplicable to laws permitting medical procedures required to save the life of the mother: H.J.Res. 27, H.J.Res. 39, H.J.Res. 62, H.J.Res. 92, H.J.Res. 99, H.J. Res. 122, H.J.Res. 125, H.J.Res. 127, H.J.Res. 133, S.J.Res. 17, S.J. Res. 18. In a different twist, H.J.Res. 198 permits an abortion to save the life of the mother, but requires that reasonable efforts be made to perserve the life of the person who is the subject of the abortion. Again, no State's rights constitutional amendments have been introduced. Four bills have been introduced to curtail Federal court jurisdiction. One measure (H.R. 867) would eliminate all Federal court jurisdiction, including the Supreme Court, to review any case arising out of State law or action relating to abortion. Others prohibit any Federal court except the Supreme Court from issuing an injunction in any case arising out of a Federal, State or local law that prohibits or regulates abortion or the provision of public assistance for the performance of abortions.

Finally, in a novel approach, three bills, H.R. 900, S. 158 and H.R. 3225, have been introduced that would define the term person to include the unborn for the purposes of the Fourteenth Amandment. These Right to Life Statutes therefore seek to overrule the contrary holding of Roe v. Wade by legislation rather than constitutional amendment on the basis that such legislation is authorized under Section 5 of the Fourteenth Amendment, which provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

F. Public Laws

93rd Congress

Five public laws governing abortion were enacted during the 93rd Congress: (1) P.L. 93-45, the Health Service Extension Act of 1973, approved June 18, 1973; (2) P.L. 93-96, the National Science Foundation Authorization Act for FY74, approved Aug. 16, 1973; (3) P.L. 93-189, the Foreign Assistance Act of 1973, approved Dec. 17, 1973; (4) P.L. 93-348, the Biomedical Research Act of 1974, approved July 12, 1974; and (5) P.L. 93-355, the Legal Services Corporation Act of 1974, approved July 25, 1974.

94th Congress

Two public laws were enacted during the 94th Congress: (1) P.L. 94-63, the Nurses Training Act of 1975, approved July 29, 1975; and (2) P.L. 94-439, the Labor-HEW Appropriations Act for FY77, approved Sept. 30, 1976.

95th Congress

During the 95th Congress, eight measures containing abortion restrictions were signed into law: (1) P.L. 95-205, the Continuing Appropriations for FY78, approved Dec. 9, 1977; (2) P.L. 95-215, the Health Services Act Amendments of 1977, approved Dec. 19, 1977; (3) P.L. 95-424, the International Development and Food Assistance Act of 1978, approved Oct. 6, 1978; (4) P.L. 95-444, the Civil Rights Commission Act, approved Oct. 13, 1978; (5) P.L. 95-457, the Defense Department Appropriations Act for FY79, approved Oct. 13, 1978; (6) P.L. 95-480, the Labor-HEW Appropriations Act for FY79, approved Oct. 18, 1978; (7) P.L. 95-481, Foreign Assistance Appropriations Act, approved Oct. 18, 1978; and (8) P.L. 95-555, the Pregnancy Disability Act of 1978, approved Oct. 31, 1978.

96th Congress

In the 96th Congress, nine public laws contained abortion restrictions: (1) P.L. 96-76, the Nurse Training Act Amendments of 1979, approved Sept. 29, 1979; (2) P.L. 96-86, the Continuing Appropriations Act for FY80, approved Oct. 12, 1979; (3) P.L. 96-93, the District of Columbia Appropriations Act for FY80, approved Oct. 30, 1979; (4) P.L. 96-123, the Further Continuing Appropriations Act for FY80, approved Nov. 20, 1979; (5) P.L. 96-154, the Department of Defense Appropriations Act for FY80, approved Dec. 21, 1979; (6) P.L. 96-306, the Supplemental Appropriations and Recission Act of 1980, approved July 8, 1980; (7) P.L. 96-369, the Continuing Appropriations Act for FY81, approved Oct. 1, 1980; (8) P.L. 96-580, the District of Columbia Appropriations Act for FY81, approved Dec. 13, 1981; (9) P.L. 96-536, the Continuing Appropriations Act for FY81, approved Dec. 16, 1981.

LEGISLATION

H.R. 900 (Hyde et al.), H.R. 3225 (Mazzoli et al.)/S. 158 (Helms et al.)

Defines "person" to include the unborn for the purpose of the right to life guarantee under the Fourteenth Amendment. Prohibits any inferior Federal court from issuing injunctive relief in any case arising out of State or local law that prohibits or regulates abortion or the provisions of public assistance for the performance of abortions. H.R. 900 introduced Jan. 19, 1981; H.R. 3225 introduced Apr. 10, 1981; referred to Committee on the Judiciary. S. 158 introduced Jan. 19, 1981; referred to Committee on the Judiciary; hearings held by Subcommittee on Separation of Powers Apr. 23-24, 1981.

HEARINGS

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CHRONOLOGY OF EVENTS

03/23/81 -- The Supreme Court upheld a Utah statute that required a physician to give notice to parents before performing an abortion upon an unemancipated, dependent minor.

09/17/80 -- Supreme Court refused to reconsider a June 30 decision upholding Congressional restrictions on the use of Medicaid funds to pay for abortions.

06/30/80 -- The U.S. Supreme Court rules that the Hyde Amendment abortion restrictions are constitutionally valid.

01/16/80 -- The annual abortion restriction to Labor/HEW appropriation bills was held unconstitutional by a U.S. district court in Brooklyn, N.Y. (*McRae* v. *Secretary, HEW*).

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ABORTION, 1980-1981: PUBLIC OPINION

ISSUE BRIEF NUMBER IB81052

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ISSUE DEFINITION

The following series of questions on Abortion were asked by various public opinion polling organizations and covers the period Aug. 1980 - Aug. 1981. The results of the survey questions shown in the tables are reported as percentages. For a discussion of the possible limitations of these poll results, consult the section titled "Some Caveats About Interpreting Public Opinion Polls and About the POLL Database," which is located on the back of the cover page.

RESULTS OF THE POLLS

NB.07/24/81.40 THE NBC/ASSOCIATED PRESS POLL

AGREE OR DISAGREE THAT ABORTION DECISION IS UP TO WOMAN AND DOCTOR?

Do you agree or disagree with the following statement: 'The decision to have an abortion should be left to the woman and her physician.' (IF AGREE, ASK) Do you strongly agree, or do you mildly agree? (IF DISAGREE, ASK) Do you strongly disagree, or do you mildly disagree?

	Percent
Strongly agree	59
Mildly agree	18
Mildly disagree	4
Strongly disagree	16
Not sure	3

NBC News and The Associated Press conducted the July National Poll by telephone on July 13 and 14 1981, among 1,599 adults across the country. The release states that, 'four hundred points were selected proportionate to the population of each region, and, within region, the size of place. Individuals were selected in accordance with a probability sample design that gives all telephone numbers (both listed and unlisted) a properly proportionate chance to be included. One adult, 18 years old and over, from each household was included, selected by a systematic procedure to provide a balance by sex.' According to the release, ' the estimated average sample tolerance of data from the July National Poll is plus or minus 3 percentage points at the 95% confidence level. That is, the chances are about 19 out of 20 that if all households with telephones in the United States had been surveyed with the same questionnaire, the results of the complete census would not be found to deviate from the poll findings by more than 3 percentage points.'

CB.07/20/81.15 THE CBS/NEW YORK TIMES POLL

ABORTION WITH AGREEMENT OF DOCTOR?

If a woman wants to have an abortion, and her doctor agrees to it, should she be allowed to have an abortion, or not?

	Percent
Should	65
Should not	22
It depends (volunteered)	10
No opinion	3

The results of the survey are based on telephone interviews with a sample of 1,467 adults conducted nationwide during the period June 28-July 1, 1981. According to the release, 'the error due to sampling could be plus or minus 3 percentage points for results based on the total sample.'

CB.07/20/81.16 THE CBS/NEW YORK TIMES POLL

ABORTION FOR GIRL UNDER 18 WITH AGREEMENT OF DOCTOR?

If a girl under the age of 18 wants to have an abortion, and her doctor agrees to it, should she be allowed to have an abortion without her parents knowing about it, or not?

	Percent
Should	32
Should not	63
It depends (volunteered)	2
No opinion	3

See Question CB.07/20/81.15 above for a description of the study.

HS.06/04/81.1 THE HARRIS SURVEY

RIGHT OF WOMAN TO HAVE ABORTION UP TO THREE MONTHS PREGNANCY

In 1973, the U.S. Supreme Court decided that state laws which made it illegal for a woman to have an abortion up to three months of pregnancy were unconstitutional, and that the decision on whether a woman should have an abortion up to three months of pregnancy should be left to the woman and her doctor to decide. In general, do you favor or oppose this part of the U.S. Supreme Court decision making abortions up to three months of pregnancy legal?

	Percent
Favor	56
Oppose	41
Not sure	3

The results of the survey are based on telephone interviews with 1,250 adults, 18 and older, conducted within the continental United States between May 6-10, 1981. According to the release, 'in a sample of this size, one can say with 95% certainty that the results are within plus or minus 3 percentage points of what they would be if the entire adult population had been polled.'

HS.06/04/81.2 THE HARRIS SURVEY

STATEMENTS ABOUT ABORTION

Now let me read you some statements that have been made about abortions. For each, tell me if you agree or disagree.

	Agree	Disagree	Not Sure
Any woman who is three months or less pregnant should have the right to decide, with her doctor's advice, whether or not she wants to have an abortion	68	30	2
Many unwanted children end up being subject to child abuse, and it's a mistake to force unwanted children to be born	61	35	4
To perform an abortion is the equivalent of murder, because a	49	47	4

fetus's life has been eliminated			
The life of a baby is just as important as the life of a mother, so abortions should be banned	41	54	5

See Question HS.06/04/81.1 above for a description of the study.

HS.06/04/81.3 THE HARRIS SURVEY

VOTE AGAINST CANDIDATE WHO DISAGREED WITH YOU ON ABORTION?

If a candidate for political office stood for most of the things you believe in but took a stand on abortion you disagreed with, would you then vote against that candidate, or not?

	Percent
Would vote against candidate	36
Would not	58
Not sure	6

See Question HS.06/04/81.1 above for a description of the study.

NB.06/04/81.11 THE NBC/ASSOCIATED PRESS POLL

DECISION TO HAVE ABORTION LEFT TO WOMAN AND HER DOCTOR?

Do you agree or disagree with the following statement: 'The decision to have an abortion should be left to the woman and her physician?

	Percent
Strongly agree	59
Mildly agree	16
Mildly disagree	4
Strongly disagree	17
Not sure	4

The results of the survey are based on telephone interviews with 1,599 adults conducted across the country between May 18-19, 1981. As stated in the release, 'four hundred points were selected proportionate to the population of each subregion, and, within subregion, the size of place. Individuals were selected in accordance with a probability sample design that gives all telephone numbers (both listed and unlisted) a properly proportionate chance to be included. One adult, 18 years old and over, from each household was included, selected by a systematic procedure to provide a balance of respondents by sex.' According to the release, 'the estimated average sample tolerance of data from the May National Poll is plus or minus 3 percentage points at the 95% confidence level. That is, the chances are about 19 out of 20 that if all households with telephones in the United States had been surveyed with the same questionnaire, the results of the complete census would not be found to deviate from the poll findings by more than 3 percentage points.'

NB.06/04/81.12 THE NBC/ASSOCIATED PRESS POLL

FAVOR CONSTITUTIONAL AMENDMENT TO BAN ABORTIONS?

Do you favor or oppose an amendment to the Constitution which would make it illegal to have an abortion?

	Percent
Strongly favor	17
Mildly favor	5
Mildly oppose	17
Strongly oppose	54
Not sure	7

See Question NB.06/04/81.11 above for a description of the study.

NB.06/04/81.14 THE NBC/ASSOCIATED PRESS POLL

MOST IMPORTANT ISSUE: BUSING, ERA, OR ABORTION?

Which of the following three issues is most important to you: the busing of public school children to achieve racial integration, the proposed Equal Rights Amendment, or abortion?

	Percent
Busing of public school children	31

Equal Rights Amendment	23
Abortion	34
Not sure	12

See Question NB.06/04/81.11 above for a description of the study.

GP.05/31/81.1 THE GALLUP POLL

1973 SURPREME COURT ABORTION RULING

The U.S. Supreme Court has ruled that a woman may go to a doctor to end pregnancy at any time during the first three months of pregnancy. Do you favor or oppose this ruling?

	Percent
Favor	45
Oppose	46
No opinion	9

The results of the survey are based on personal interviews with 1,519 adults, 18 and older, conducted in more than 300 sampled localities across the nation between May 8-11, 1981. According to the release, 'for results based on a sample of this size, one can say with 95 percent confidence that the error attributable to sampling and other random effects could be three percentage points in either direction.'

GP.05/31/81.2 THE GALLUP POLL

WHEN DOES LIFE BEGIN?

Some people feel that human life begins at the moment of conception. Others feel that human life does not begin until the baby is actually born. Do you, yourself, feel that human life begins at conception, at the time of the birth, or at some point in between?

	Percent
At conception	54
At birth	17

In between	22
No opinion	7

See Question GP.05/31/81.1 above for a description of the study.

GP.05/31/81.3 THE GALLUP POLL

ATTITUDES TOWARD LEGALIZING ABORTION

Do you think abortions should be legal under any circumstances, legal under only certain circumstances, or illegal in all circumstances?

	Percent
Legal under any circumstances	23
Legal under only certain circumstances	52
Illegal under all circumstances	21
No opinion	4

See Question GP.05/31/81.1 above for a description of the study.

CB.05/02/81.11 THE CBS/NEW YORK TIMES POLL

VIEWS ON ABORTION WITH AGREEMENT OF DOCTOR?

If a woman wants to have an abortion, and her doctor agrees to it, should she be allowed to have an abortion, or not?

	Percent
Should	63
Should not	25
Depends (volunteered)	9
No opinion	3

The results of the survey are based on telephone interviews among a nationwide random sample of 1,439 adults conducted between Apr. 22-26, 1981. According to the release, 'the error due to sampling could be plus or minus 3 percentage points for results based on the total sample.'

HS.12/04/80.4 THE HARRIS SURVEY

CONSTITUTIONAL AMENDMENT BANNING ABORTIONS

Do you agree or disagree that a Constitutional Amendment should be passed to ban legalized abortion?

	Percent
Agree	34
Disagree	62
Not sure	4

Results are based on telephone interviews with 'a cross section of 1,199 adults nationwide' conducted between Nov. 7-10, 1981.

GP.11/16/80.1 THE GALLUP POLL

OPINIONS ON VARIOUS ISSUES

This card (respondents were handed a card listing various issues) lists various proposals being discussed in this country today. Would you tell me whether you generally FAVOR or generally OPPOSE each of these proposals?

	Favor	Oppose	Don't know
A ban on all abortions	31	65	4

Results are based on personal interviews with 1,602 adults, 18 and older, conducted in over 300 scientifically-selected localities across the nation during the period Sept. 12-15. The error due to sampling could be plus or minus 3 percentage points for results based on the entire sample.

CB.11/15/80.27 THE CBS/NEW YORK TIMES POLL

GOVERNMENT IMPACT ON ABORTION AND BUSINESS REGULATION

I'd like to ask your opinion on the following statements.

	Agree	Disagree	No opinion
...The government should help a poor woman with her medical bills if she wants an abortion. Do you agree or disagree?	38	55	7

This poll was conducted by telephone Nov. 7-12, 1980. It consists of reinterviews of 2,651 adults who were part of a nationwide random sample of 3,091 adults originally interviewed Oct. 30 - Nov. 1, 1980. A total of 2,012 of the 2,264 registered adults (89%) originally interviewed were successfully reinterviewed. A total of 639 of the sample of 827 unregistered adults (77%) were reinterviewed. A total of 1,805 persons who were reinterviewed indicated that they had voted in the general election. This constituted 68.1% of all persons reinterviewed and 89.7% of the registered voters reinterviewed. The error due to sampling could be plus or minus 2.5 percentage points for results based on the sample of registered voters. The error due to sampling on differences for questions that were asked of the same people in both interviews is about half of that.

HS.10/06/80.2 THE HARRIS SURVEY

ATTITUDES ON VARIOUS RELIGIOUS ISSUES

Do you agree or disagree that [READ EACH ITEM]?

	Agree	Disagree	Not Sure
A constitutional amendment should be passed to ban legalized abortion	34	61	5

Results are based on telephone interviews with 1,492 'Likely Voters' nationwide conducted between Sept. 3-7, 1981.

NB.09/30/80.29 THE NBC/ASSOCIATED PRESS POLL

ABORTION DECISION LEFT TO WOMAN AND PHYSICIAN

Do you agree or disagree with the following statement. "The decision to have an abortion should be left to the woman and her physician."
(AMONG ALL LIKELY VOTERS -- 63.2% of total sample)

	% Likely Voters
Agree	72
Disagree	24

Not sure	4

A total of 2,393 adult Americans were interviewed nationwide by telephone in the three days immediately following the televised debate between Ronald Reagan and John Anderson (Sept. 22-24, 1980). Of that total, 1,512 persons were judged to be 'likely voters.' Four hundred localities were selected proportionate to the population of each subregion, and, within subregion, the size of place. Individuals were selected in accordance with a probability sample design that gives all telephone numbers (both listed and unlisted) a properly proportionate chance to be included, selected by a systematic procedure to provide a balance of respondents by sex. The estimated average sample tolerance, at the 95% confidence level, of the data from this poll, is plus or minus 3 percentage points for the entire sample of 2,393 adults. The estimated average sampling error for the sample of 1,512 'likely voters' is plus or minus 4 percentage points.

NB.09/30/80.30 THE NBC/ASSOCIATED PRESS POLL

CANDIDATES' POSITIONS ON ABORTION

In thinking about your presidential vote choice, how important to you are the candidates' stands on abortion ... very important, somewhat important, or not at all important?

(AMONG ALL LIKELY VOTERS -- 63.2% of total sample)

	% Likely Voters
Very important	30
Somewhat important	38
Not at all important	29
Not sure	3

See Question NB.09/30/80.29 above for a description of the study.

CB.09/27/80.31 THE CBS/NEW YORK TIMES POLL

CONSTITUTIONAL AMENDMENT PROHIBITING ABORTIONS

Would you favor or oppose having a Constitutional Amendment that would prohibit abortions?

(POST-DEBATE ONLY -- 50% of PROBABLE ELECTORATE)

	Post-Debate
Favor	32
Oppose	58
No opinion	10

This poll was conducted by telephone Sept. 19-21, 1980, and Sept. 23-25, 1980, among two nationwide random samples. A total of 1,627 registered voters were interviewed, 817 before the debate and 810 after. A total of 2,303 adults were contacted to reach this number. All respondents were weighted according to their probability of voting. The estimate of their likelihood was based on prior voting participation, and the individual's intention of voting in the fall. This is referred to as the 'probable electorate.' (1,627 registered voters = 71% of all persons contacted, PRE-DEBATE sample = 35% of all persons contacted, and POST-DEBATE sample = 35% of all persons contacted). The 'PROBABLE ELECTORATE' consists of all registered voters (= 1,627) with responses weighted by their probability of voting. All responses in the study reflect this weighting procedure. The error due to sampling could be plus or minus 5 percentage points for results based on each sample (i.e., PRE- and POST-DEBATE sample).

CB.09/27/80.32 THE CBS/NEW YORK TIMES POLL

CANDIDATES' POSITIONS ON ABORTION AMENDMENT

Where do you think ... stands on a Constitutional Amendment prohibiting abortions? Does ... favor or oppose having a Constitutional Amendment that would prohibit abortions?

(POST-DEBATE ONLY -- 50% of PROBABLE ELECTORATE)

	Jimmy Carter	Ronald Reagan	John Anderson
Favor	24	34	17
Oppose	41	32	35
No opinion	35	34	48

See Question CB.09/27/80.31 above for a description of the study.

CB.09/27/80.33 THE CBS/NEW YORK TIMES POLL

WILL ABORTION POSITION INFLUENCE VOTE

Of the six issues I've mentioned, will abortion be among the top three issues in deciding how you will vote for President, or won't it be very important in determining your vote? (IF NECESSARY: The issues are government spending on domestic programs, U.S. military strength, income taxes, reducing dependence on foreign oil, the Equal Rights Amendment and abortion.)
(POST-DEBATE ONLY -- 50% of PROBABLE ELECTORATE)

	Post-Debate
Yes	17
No	77
No opinion	6

See Question CB.09/27/80.31 above for a description of the study.

GP.08/28/80.1 THE GALLUP POLL

LEGALITY OF ABORTIONS

Do you think abortions should be legal under any circumstances, legal under only certain circumstances, or illegal in all circumstances?

	Percent
Legal under all circumstances	25
Legal only under certain circumstances	53
Illegal under all circumstances	18
No opinion	4

The results are based on 1,548 personal interviews with adults, 18 and over, conducted in more than 300 scientifically selected localities across the nation during the period July 11-14, 1980. For results based on the total sample, one can say with 95 percent confidence that the error attributable to sampling could be three percentage points in either direction.

NB.08/25/80.3 THE NBC/ASSOCIATED PRESS POLL

ABORTION DECISION LEFT TO WOMAN AND PHYSICIAN

Do you agree or disagree with the following statement: "The decision to have an abortion should be left to the woman and her physician."

(AMONG ALL LIKELY VOTERS -- 56.8% of total sample)

	% Likely Voters
Agree	78
Disagree	17
Not sure	5

NBC News and The Associated Press conducted this poll after the Democratic Convention by telephone on Aug. 15 and 16, 1980, across the country. A total of 2,000 adult Americans were interviewed, of whom 1,137 were judged to be 'likely voters.' The release stated the following about 'Likely Voters:' "'Likely voters' reflects a procedure designed to identify for purposes of analysis persons in the sample who, other things being equal, have characteristics that suggest they are more likely to be representative of the slightly more than 50% of the adult population that can be expected to vote for President in November. It is very important to understand that applying the term 'likely voters' to the raw standing of the candidates as of now does NOT produce a significantly better idea of which candidate will actually win the election. No poll taken in August (or September) can predict the outcome of the coming Presidential Election. All that the use of the term 'likely voters' in connection with such numbers does is heighten the widely held but thoroughly false impression that such poll data is an accurate prognostication of the way the election will turn out." Four hundred localities were selected proportionate to the population of each subregion, and, within subregion, the size of place. Individuals were selected in accordance with a probability sample design that gives all telephone numbers (both listed and unlisted) a properly proportionate chance to be included. One adult 18 years or over from each household was included, selected by a systematic procedure to provide a balance of respondents by sex. The estimated average sampling tolerance, at the 95% confidence level, of data from this poll, is plus or minus 3 percentage points for the entire sample of 2,000 adults. The sampling error for the sample of 'likely voters' is plus or minus 4 percentage points.

NB.08/25/80.4 THE NBC/ASSOCIATED PRESS POLL

PARTIES' PLATFORMS -- ABORTION

The Democratic Party has endorsed the right of women to have an abortion while the Republican Party strongly opposes abortion. Do these positions on abortion make you more likely to vote for Jimmy Carter or more likely to vote for Ronald Reagan, or don't these positions on abortion make a difference?

(AMONG ALL LIKELY VOTERS -- 56.8% of total sample)

	% Likely Voters
More likely to vote for Carter	35
More likely to vote for Reagan	20
No difference	40
More likely to vote for Anderson (volunteered)	1
More likely to vote for McCormick (volunteered)	*
Not sure	4

NOTE(S): * Less than 0.5%

See Question NB.08/25/80.3 above for a description of the study.

CB.08/09/80.32 THE CBS/NEW YORK TIMES POLL

CONSTITUTIONAL AMENDMENT PROHIBITING ABORTION

Do you think there should be an amendment to the Constitution prohibiting abortions, or shouldn't there be such an amendment? *

	Percent
Should	29
Should Not	62
No Opinion	9

NOTE(S): * DIFFERENT QUESTION WORDING (See CB.8-9-80.41 and CB.8-9-80.49)

Survey results are based on a nationwide random sample of 1,769 adults, including 410 Republicans, 692 Democrats, and 667 Independents and other party members. For all questions involving voting in the general elections, respondents were also weighted according to their probability of voting. The estimate of their likelihood was based on registration, prior voting participation, and the individual's intention of voting in the fall. This is referred to as the 'probable electorate' in the text. One-third of the sample is not sure they will vote in November. And if trends continue, about half of the eligible voters will actually vote. Intention to vote this year related well to voting history. Of the two-thirds who said they 'definitely' would vote for President this year, 81% voted in 1976 and 43% already voted in 1980. Only 6% have never voted. Of those unsure about voting this fall, only 42% voted in 1976 and 12% in 1980. 28% never voted before. In the first group 90% are registered, in the second 52%. (Republicans = 23% of the Total Sample; Democrats = 39% of the Total Sample; Independents/Other = 38% of the Total Sample; and Probable

Electorate = 66% of the Total Sample). Interviewing for this poll was conducted both before and after President Carter's August 4 press conference. In order to control for any bias in the sample individuals interviewed BEFORE and AFTER the press conference took place were weighted as separate samples, and then combined into one group. The resulting distribution of respondents from both groups are the same for age, education, race, sex and political party. 976 respondents were interviewed BEFORE the press conference and 793 respondents were interviewed AFTER the press conference. The error due to sampling could be plus or minus 3 percentage points for results based on the total sample.

NOTE: Three questions regarding abortion, each worded differently, were included in the survey. Release states: Changes in the way an abortion question is asked can dramatically affect the results. Respondents overwhelmingly think a woman should be allowed to have an abortion if she wants one and her doctor agrees; oppose an amendment prohibiting abortions; but support an amendment protecting unborn life. While Americans are more supportive of an amendment labeled pro-life than they are of an amendment labeled anti-abortion, contradiction is greatest among the lower educated. Presumably these are the respondents most susceptible to changes in question wording. While most of the public would not support a constitutional amendment outlawing abortions, the Republican party does significantly better on the notion of a 'pro-life' amendment, as it was often referred to on the convention floor. Democrats were more likely to agree than were Republicans.

CB.08/09/80.33 THE CBS/NEW YORK TIMES POLL

REPUBLICAN PARTY PLATFORM AND THE ANTI-ABORTION AMENDMENT

Does the Republican party platform favor or oppose an amendment to prohibit abortions?

	Percent
Favor	21
Oppose	23
No Opinion	56

See Question CB.08/09/80.32 above for a description of the study.

CB.08/09/80.38 THE CBS/NEW YORK TIMES POLL

ISSUES WHICH STRONGLY INFLUENCE VOTE FOR PRESIDENT THIS YEAR

Will any of the following issues strongly influence your vote for President this year -- a large tax cut, U.S. military superiority, the Equal Rights Amendment, abortion, or the 55 mile per hour speed limit? (IF YES) Which?

	Percent *
Large Tax Cut	28
U.S. Military Superiority	32
Equal Rights Amendment	18
Abortion	21
55 MPH Speed Limit	19

NOTE(S): * Total adds to more than 100% due to multiple responses.

See Question CB.08/09/80.32 above for a description of the study.

CB.08/09/80.41 THE CBS/NEW YORK TIMES POLL

CONSTITUTIONAL AMENDMENT PROTECTING THE LIFE OF THE UNBORN

Do you believe there should be an amendment to the Constitution protecting the life of the unborn child, or shouldn't there be such an amendment? *
(PROBABLE ELECTORATE Sample - 66% of the Total Sample)

	Percent
Should	50
Should Not	39
No Opinion	11

NOTE(S): * DIFFERENT QUESTION WORDING (See CB.8-9-80.32 and CB.8-9-80.49)

See Question CB.08/09/80.32 above for a description of the study.

CB.08/09/80.49 THE CBS/NEW YORK TIMES POLL

CHOICE FOR ABORTION

If a woman wants to have an abortion and her doctor agrees to it, should she be allowed to have an abortion, or not? *

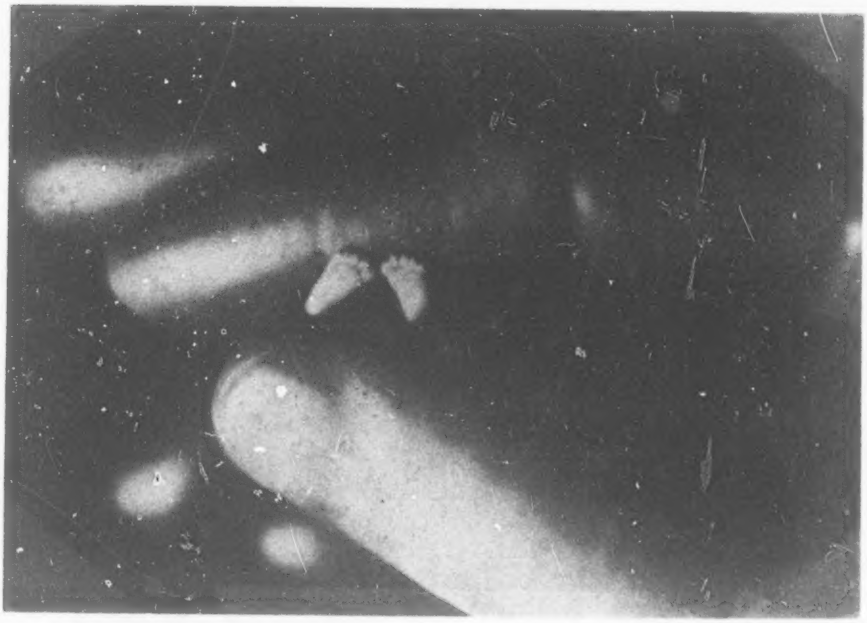
	Percent
Should	62
Should Not	19
Depends (Voluntary)	15
No Opinion	4

NOTE(S): * DIFFERENT QUESTION WORDING (See CB.8-9-80.32 and CB.8-9-80.41)

See Question CB.08/09/80.32 above for a description of the study.

PART 5.--VISUAL EVIDENCE

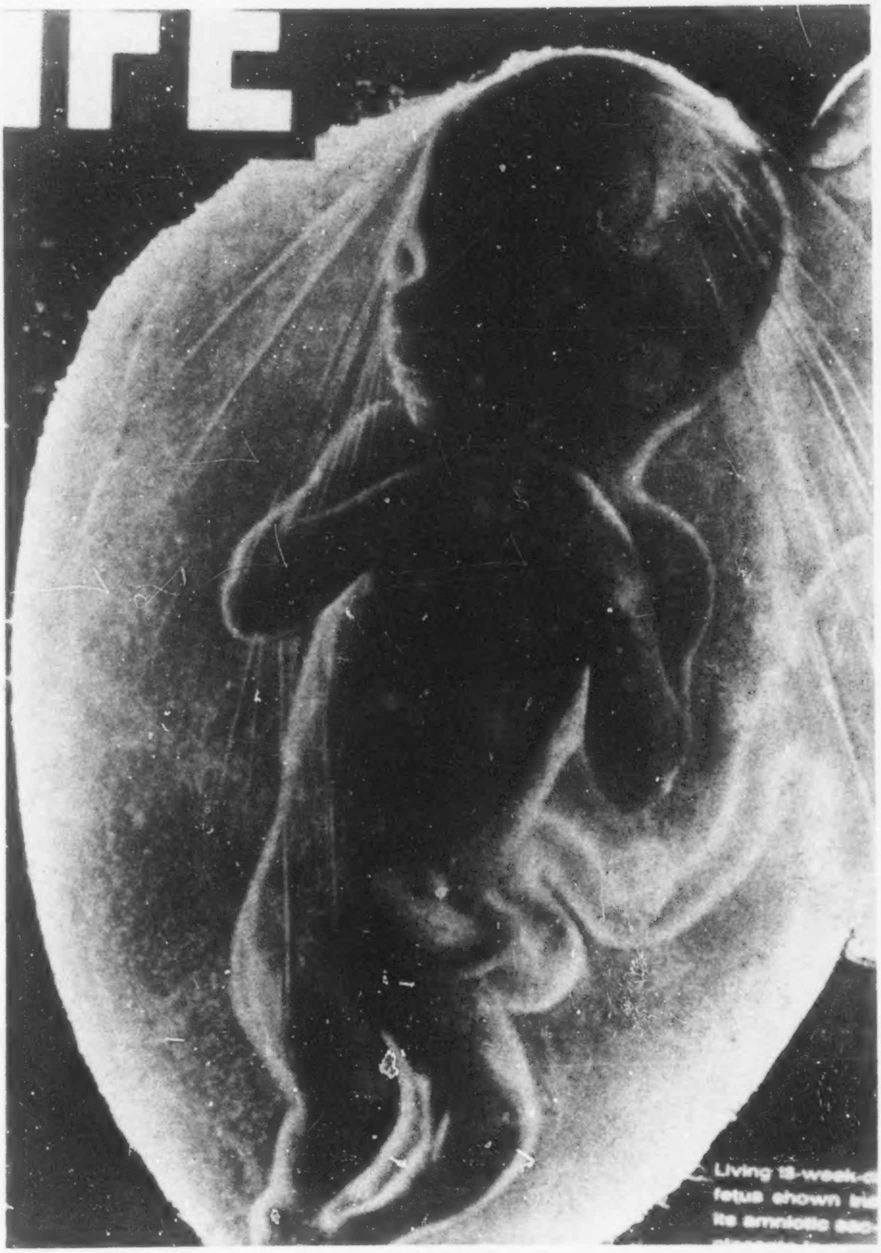
Human life at eight weeks.
--- Electrocardiogram of heart can be made.
--- If an instrument is placed in palm of his hand, he will grab it and hang on.
--- Swims freely in amniotic fluid with a natural swimmer's stroke.
(With permission, Handbook on Abortion, Willke, Hayes Pub. Co.)



Tiny human feet at ten weeks, perfectly formed. (With permission, Handbook on Abortion, Willke, Hayes Pub. Co.)

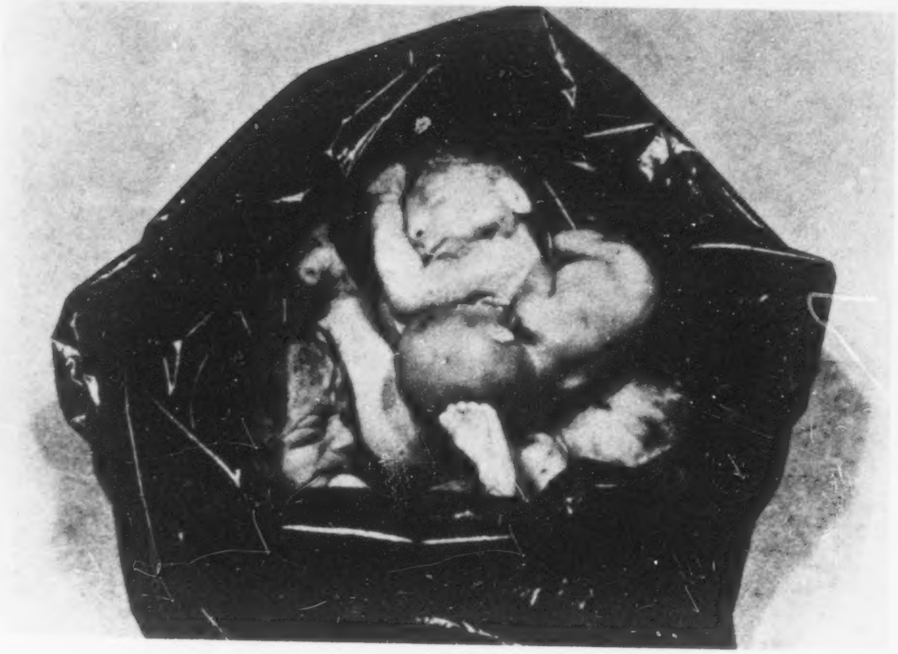
Eleven week baby still in his sac. At this stage all organ systems are functional. He breathes, swallows, digests, and urinates. He is very sensitive to pain, recoiling from pinprick, noise, and seeks a position of comfort when disturbed. Soon he will sleep and wake with his mother. If his amniotic fluid is sweetened, he will swallow more often, if it is made sour he will quit swallowing. He can be taught by sound signals to anticipate and recoil from a pain stimulus, but no two little ones will respond the same, they are already individuals. At this stage Arnold Gesel has said, "The organization of his psychosomatic self is well underway." After this time nothing new will develop or function, only further growth and maturation. (With permission, Handbook on Abortion, Willke, Hayes Pub. Co., Photo by Dr. William Liley.)

A 14 week little one. Is he human? (Photo by Dr. William Liley, New Zealand.) With permission, Handbook on Abortion, Dr. & Mrs. J. C. Willke, Hayes Pub. Co.)

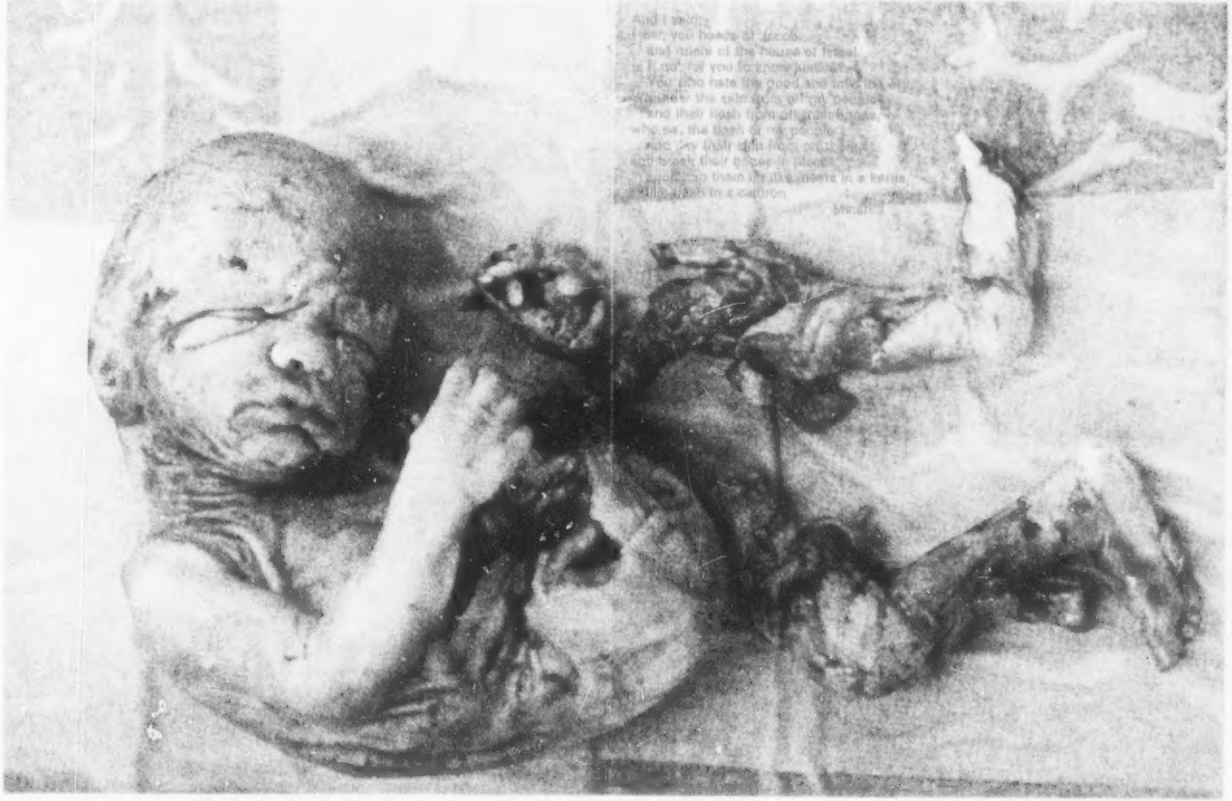


This remarkable photo of a live, intra-uterine baby 18 weeks after conception is from LIFE Magazine. Is he a human being? He is the same gestational age as Marcus (picture #2) when he was born, yet this baby can be killed as long as he is still inside his mother's womb.

Salt poisoning abortion at 19 weeks.
(With permission, Handbook on Abortion, Willke, Hayes Pub. Co.)



Human Garbage -- "These dead babies had reached fetal ages of 18 to 24 weeks before being killed by abortion. This is the result of one morning's work at a Canadian teaching hospital." (With permission, Handbook on Abortion, Willke, Hayes Pub. Co.)



BABY BOY, unnamed. Coroner's case #82-1901-1, weight after abortion 900 gm (2 lbs.), age 27-29 weeks, cause of death.